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UNITED STATES REPORTS

VOLUME 281

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1929

FROM FEBRUARY 24, 1930 (CONCLUDED)
TO AND INCLUDING JUNE 2, 1930

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JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS [1]

CHARLES EVANS HUGHES, Chief Justice.[2]
OLIVER WENDELL HOLMES, Associate Justice.
WILLIS VAN DEVANTER, Associate Justice.
JAMES CLARK McREYNOLDS, Associate Justice.
LOUIS D. BRANDEIS, Associate Justice.
GEORGE SUTHERLAND, Associate Justice.
PIERCE BUTLER, Associate Justice.
EDWARD T. SANFORD, Associate Justice.[3]
HARLAN FISKE STONE, Associate Justice.
OWEN J. ROBERTS, Associate Justice.[3]

WILLIAM D. MITCHELL, Attorney General.
CHARLES E. HUGHES, Jr., Solicitor General.[4]
THOMAS D. THACHER, Solicitor General.[4]
CHARLES ELMORE CROPLEY, Clerk.
FRANK KEY GREEN, Marshal.

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[1] For allotment of the Chief Justice and Associate Justices among the several circuits, see next page.

[2] Mr. Chief Justice Hughes took no part in the consideration or decision of any of the matters decided at this term that were argued or submitted before February 24, 1930.

[3] Mr. Justice Sanford died March 8, 1930. On May 9, 1930, President Hoover nominated Mr. Owen J. Roberts, of Pennsylvania. The nomination was confirmed by the Senate on May 20, 1930. The judicial oath was administered, and he took his seat upon the bench, on June 2, 1930.

[4] Mr. Charles E. Hughes, jr., tendered his resignation as Solicitor General on February 15, 1930, to take effect upon its acceptance by the President. On February 20, 1930, President Hoover nominated Mr. Thomas D. Thacher, of New York. The nomination was confirmed on March 22, 1930. Mr. Hughes's resignation was accepted April 17, 1930, and Mr. Thacher took the oath of office on that day.

135425

SUPREME COURT OF THE UNITED STATES

ALLOTMENT OF JUSTICES

It is ordered, That the following allotment be made of the Chief Justice and Associate Justices of this Court among the circuits, agreeably to the acts of Congress in such case made and provided, and that such allotment be entered of record, viz:

For the First Circuit, OLIVER WENDELL HOLMES, ASSOCIATE JUSTICE.

For the Second Circuit, HARLAN FISKE STONE, ASSOCIATE JUSTICE.

For the Third Circuit, OWEN J. ROBERTS, ASSOCIATE JUSTICE.

For the Fourth Circuit, CHARLES EVANS HUGHES, CHIEF JUSTICE.

For the Fifth Circuit, LOUIS DEMBITZ BRANDEIS, ASSOCIATE JUSTICE.

For the Sixth Circuit, JAMES C. MCREYNOLDS, ASSOCIATE JUSTICE.

For the Seventh Circuit, WILLIS VAN DEVANTER, ASSOCIATE JUSTICE.

For the Eighth Circuit, PIERCE BUTLER, ASSOCIATE JUSTICE.

For the Ninth Circuit, GEORGE SUTHERLAND, ASSOCIATE JUSTICE.

For the Tenth Circuit, WILLIS VAN DEVANTER, ASSOCIATE JUSTICE.

June 2, 1930.

The next preceding allotment (see 279 U. S., p. IV) was amended by order of March 12, 1930, assigning Mr. Chief Justice Hughes to the Fourth Circuit.

SUPREME COURT OF THE UNITED STATES

MONDAY, MARCH 10, 1930

PRESENT: MR. JUSTICE HOLMES, MR. JUSTICE VAN DEVANTER, MR. JUSTICE BRANDEIS, and MR. JUSTICE SUTHERLAND.

MR. JUSTICE HOLMES said:

"On Saturday, just as we were expecting him at a conference of the Justices, we were informed that our brother, MR. JUSTICE SANFORD, had become unconscious pending a slight operation. Five minutes later we received word that he was dead. Thus suddenly the light of a faithful worker, who was born also to charm, went out. Afterwards came the news that the late CHIEF JUSTICE had found relief from his hopeless illness in death.[1] Such events must be accepted in silent awe.

"A committee of the Court, consisting of the CHIEF JUSTICE, MR. JUSTICE MCREYNOLDS, MR. JUSTICE BUTLER, and MR. JUSTICE STONE, has gone to Tennessee for the services over the late MR. JUSTICE SANFORD, and on Tuesday the whole Court will attend the funeral of MR. TAFT.

"In pursuance of the statute the Court will stand adjourned until to-morrow, when it will be adjourned again until Wednesday next at 12 o'clock, when the matters then in order will be taken up."

Adjourned until to-morrow at 12 o'clock.

---

[1] The death of the late Chief Justice occurred at Washington on March 8, 1930. Funeral services were held on March 11, at All Souls Unitarian Church, in that city. The burial, on the same day, was at Arlington. The last rites for Mr. Justice Sanford, and the interment, were at Knoxville, Tennessee, on March 10, 1930.

SUPREME COURT OF THE UNITED STATES

THURSDAY, MARCH 13, 1930

PRESENT: The CHIEF JUSTICE, Mr. JUSTICE HOLMES, Mr. JUSTICE VAN DEVANTER, Mr. JUSTICE MCREYNOLDS, Mr. JUSTICE BRANDEIS, Mr. JUSTICE SUTHERLAND, Mr. JUSTICE BUTLER, and Mr. JUSTICE STONE.

Mr. William Tyler Page, Clerk of the House of Representatives of the United States, presented the following resolutions:

IN THE HOUSE OF REPRESENTATIVES,

March 10, 1930.

The House having learned with profound sensibility and sorrow of the death of William Howard Taft, former President of the United States and Chief Justice of the United States Supreme Court:

Resolved, That as a token of honor to the many virtues, public and private, of the illustrious statesman, and as a mark of respect to one who has held such eminent public station, the Speaker of this House shall appoint a committee to attend the funeral of Mr. Taft on behalf of the House.

Resolved, That such committee may join such committee as may be appointed on the part of the Senate to consider and report by what further token of respect and affection it may be proper for the Congress of the United States to express the deep sensibility of the Nation.

Resolved, That the Clerk communicate these resolutions to the Senate and to the Supreme Court and transmit a copy of the same to the afflicted family of the illustrious dead.

Resolved, That the Sergeant at Arms of the House be authorized and directed to take such steps as may be necessary for carrying out the provisions of these resolutions, and that the necessary expenses in connection therewith be paid out of the contingent fund of the House.

Resolved, That as a further mark of respect to the memory of the late William Howard Taft and the late Edward Terry Sanford this House do now adjourn until Wednesday, March 12, 1930.

Attest:

[SEAL.] WM. TYLER PAGE, *Clerk.*

IN THE HOUSE OF REPRESENTATIVES, U. S.,
March 10, 1930.

Resolved, That the House has heard with profound sorrow of the death of Hon. Edward Terry Sanford, Associate Justice of the Supreme Court of the United States.

Resolved, That the Clerk communicate these resolutions to the Senate and to the Supreme Court and transmit a copy thereof to the family of the deceased.

Attest:

[SEAL.] WM. TYLER PAGE, *Clerk.*

The CHIEF JUSTICE said:

"The resolutions adopted by the House of Representatives and presented by the Clerk of the House are received, and it is ordered that they be spread upon the records of the Court."

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1929

KANSAS CITY SOUTHERN RAILWAY COMPANY *v.* GUARDIAN TRUST COMPANY ET AL.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. 22. Argued January 15, 16, 1930.—Decided February 24, 1930.

1. When used without qualification in a decree of a federal court, the word "costs" means the amounts taxable as such under Acts of Congress, rules promulgated by its authority and practice established consistently with governing enactments. P. 9.
2. In equity costs not otherwise governed by statute are given or withheld in the sound discretion of the court according to the facts and circumstances of the case. *Id.*
3. A decree merely allowing costs to be taxed does not mean that anything is to be included on account of counsel fees in addition to the nominal amounts specified in the statute (U. S. C., Title 28, §§ 571, 572) as attorney's fees. *Id.*
4. Even if it be assumed that federal equity courts have jurisdiction to allow costs as between solicitor and client and to include therein attorney's fees in excess of the amount prescribed by statute, the purpose to authorize such costs and to make such allowance should be clearly expressed in the decree. *Id.*
5. Where a decree of the Circuit Court of Appeals reversing the District Court with directions to enter a specific decree with costs, to be taxed under the principles, rules and practice in equity, was entered after a rehearing at which, for the first time, it was sug-

gested that the defeated party should be found guilty of bad faith in instigating and prosecuting the litigation, and, on that ground, should be taxed with solicitor's fees and other expenses incurred by the prevailing party, as part of its costs, *held,* construing the decree in connection with the opinion of the court and with regard to the issues before it on appeal, that the decree did not authorize or permit the taxation of costs as between solicitor and client. P. 10.

6. The District Court can not vary a mandate of this Court requiring the execution of a decree of the Circuit Court of Appeals, or give any further relief. P. 11.

28 F. (2d) 233, reversed; District Court affirmed.

CERTIORARI, 279 U. S. 827, to review a decree of the Circuit Court of Appeals which reversed a decree of the District Court refusing to tax counsel fees and other expenses as costs in favor of the Trust Company as part of a decree entered under an earlier ruling of the Circuit Court of Appeals. See also 210 Fed. 696; 240 U. S. 166; 146 Fed. 337; 171 *id.* 43.

Mr. Samuel W. Moore, with whom *Messrs. Frank H. Moore, Cyrus Crane* and *A. F. Smith* were on the brief, for petitioner.

Mr. Justin D. Bowersock, with whom *Messrs. Robert B. Fizzell* and *John F. Rhodes* were on the brief, for respondent.

The District Court had power to effect reimbursement of the Trust Company without regard to any other principle justifying the imposition of solicitor and client costs, for the reason that it was defending the Belt collateral against the attack of the Southern Company upon the title of its pledgor.

The mandate of this court on the former appeal dealt only with party and party costs, and not with solicitor and client costs, and has no bearing upon the issues herein. The Act of February 26, 1853, regulates party and party costs only.

The federal courts are, by the Constitution, vested with the equity powers possessed by the High Court of Chancery in England at the time the Constitution was adopted.

The English authorities allow solicitor and client costs even in the absence of a fiduciary relationship, where charges of gross fraud and misconduct have been made and not sustained. *Ex parte Simpson,* 15 Ves. Jr. 476 (1809); *Passingham* v. *Sherborn,* 9 Beavan 424 (1839); *Ibberson* v. *Worth,* 1 Jur. (N. S.) 440 (1855); *D'Oechsner* v. *Scott,* 24 Beavan 239 (1857); *Forester* v. *Read,* L. R. 6 Ch. App. 40 (1870); *Kevan* v. *Crawford,* L. R. 6 Ch. D. 29 (1877); *Fane* v. *Fane,* L. R. 13 Ch. D. 228 (1878); *Bruty* v. *Edmundson,* L. R. (1917) 2 Ch. 285; cf. *Mayhew* v. *Phoenix Insurance Co.,* 23 Mich. 105.

Many authorities allow solicitor and client costs, even in the absence of a fiduciary relationship, where the litigation is so baseless and unwarranted as to justify an implication of bad faith. *The Apollon,* 9 Wheat. 362; *Patterson* v. *Ball,* 18 Fed. Cas. No. 10,823; *The Elizabeth Frith,* 8 Fed. Cas. No. 4361; *In re Wright,* 16 Fed. 482; *Gulf & S. I. R. Co.* v. *Walker,* 104 Miss. 363; *Joslyn* v. *Parlin,* 54 Vt. 670; *Spring Garden Insurance Co.* v. *Amusement Syndicate Co.,* 178 Fed. 519; *J. E. North Lumber Co.* v. *Gary,* 83 Miss. 640; *Bank of Philadelphia* v. *Posey,* 130 Miss. 530; *O'Neal* v. *Spivey,* 145 S. E. 71; *North Missouri R. Co.* v. *Lackland,* 25 Mo. 515; *Beach* v. *Macon Grocery Co.,* 125 Fed. 513; *In re Lacov,* 142 Fed. 960; *In re Wentworth Lunch Co.,* 191 Fed. 821; *Myers* v. *Frankenthal,* 55 Ill. App. 390; *St. Louis* v. *St. Louis Gas Light Co.,* 11 Mo. App. 237; *Weston* v. *Watts,* 45 Hun. 219; *Hernandez* v. *Brookdale Mills,* 232 N. Y. 552; *Anderson* v. *Marietta National Bank,* 93 Okla. 241; *Delcambre* v. *Murphy,* 5 S. W. (2d) 789; *Atlantic Trust Co.* v. *Chapman,* 208 U. S. 360; *Buell* v. *Kanawha Lumber Corp.,* 201 Fed. 762; *Ephriam* v. *Pacific Bank,* 129 Cal. 589; *In re Shockett,* 177 Fed. 583.

A public policy in favor of the imposition of solicitor and client costs against one who instigates an unwarranted and baseless suit, is evidenced by various statutes and rules of court imposing costs and attorneys' fees in certain cases where unreasonable or unwarranted claims or defenses are insisted upon.

Where a fiduciary relation exists between the parties, expenses occasioned by baseless and unwarranted litigation are taxable as solicitor and client costs against the offending party.

Various fiduciary relationships were involved, and the Southern Company itself was trustee for the Trust Company. There was a fund in court.

MR. JUSTICE BUTLER delivered the opinion of the Court.

The question is whether the Guardian Trust Company, in addition to amounts taxable as costs between party and party, is entitled to recover anything on account of counsel fees or other expenses as costs between solicitor and client.

In a judgment creditor's suit brought in the United States Circuit Court for the Western District of Missouri by the Cambria Steel Company against the Kansas City Suburban Belt Railroad Company, receivers were appointed for the latter. It had given its notes for large amounts to the Trust Company and pledged stocks and bonds as collateral security. The Kansas City Southern Railway Company had acquired on mortgage foreclosures the properties of the Belt Company, and of the Kansas City, Pittsburg & Gulf Railroad Company.

The Trust Company claimed that the Southern Company, having succeeded to the properties of the Belt Company and of the Gulf Company on terms that preferred shareholders to creditors, became liable for their

debts.* It brought three suits in a Missouri court to compel the Southern Company to pay the debts owing to it by them. Thereupon the Southern Company brought two suits against the Trust Company in the United States court to enjoin prosecution of the state court cases. One related to the actions on the debts of the Belt Company (146 Fed. 337) and the other to all the actions. 171 Fed. 43. Injunctions granted by the lower court were dissolved by the Circuit Court of Appeals.

In the creditor's suit, the Belt Company and its receivers filed an ancillary bill against the Trust Company to have the claims of the latter against the former declared invalid, to recover the collateral security, and to have an accounting. The Southern Company intervened, claiming under the foreclosure, and sought to recover the collateral security and other property from the Trust Company. The decree of the Circuit Court, except as to matters not important here, denied relief against the Trust Company, established its claims against the Belt Company and, notwithstanding the Trust Company's contention that the issue was not before the court, adjudged that the Southern Company was not liable therefor, and ordered that one-third of the costs be borne by the Trust Company and two-thirds by the Southern and Belt Companies.

The matters adjudged in favor of the Trust Company were not taken to the Circuit Court of Appeals for review. The Trust Company appealed. It insisted that the lower court erred in holding that the Southern Company was not indebted to it. Preferring to pursue that company in the actions pending in the state court, it had not prayed judgment in this suit against the Southern Company. It

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* *Northern Pacific Ry.* v. *Boyd,* 228 U. S. 482, decided while this case was pending in the Circuit Court of Appeals on the first appeal.

also maintained that the lower court erred in holding it liable for any part of the costs.

After the case had been argued and submitted but before opinion was announced, owners of a small minority of the shares of the Trust Company were permitted to file a suggestion that the Trust Company should have judgment against the Southern Company for the debt of the Belt Company. The court reversed the decree below, decided the Southern Company became liable for that debt, postponed for further argument the question whether under the pleadings the Trust Company might have judgment therefor, and held it was entitled to recover its entire costs. 201 Fed. 811, 829.

Later the same stockholders by leave of the Circuit Court of Appeals filed, and at the final submission of the case were heard in support of, the following suggestions:

That the court embody in its order for reversal a special finding that the creditor's bill, ancillary bill and intervening petition were instigated and prosecuted by and for the Southern Company without good faith, and that the entire litigation was trivial, wanton and oppressive. That it direct the lower court to reserve jurisdiction to ascertain the amount of solicitors' fees and other expenses necessarily incurred by the Trust Company in making its defenses, to find the amount of such expenses, tax them as costs in the case and enter a further decree against the Southern Company therefor. Or in the alternative that the final decree below be without prejudice to the right of the Trust Company to sue the Southern Company for such expenses. That such additional decree also include the expenses and damages incurred by and resulting to the Trust Company from the second injunction suit (171 Fed. 43) and that it be without prejudice to the rights of the Trust Company to move for such damages and expenses in the first injunction suit. 146 Fed. 337.

In its second opinion the Circuit Court of Appeals dealt with these suggestions. 210 Fed. 696. It said (p. 723):

"A deliberate consideration of this petition and of the exhaustive arguments of counsel have, however, persuaded that inasmuch as the questions suggested came for the first time into this suit at the rehearing in this court, as no evidence has been taken relative to them and as the evidence upon the issues tried in this case was not brought to this court, it would be unwise and might be unjust to adjudicate the questions presented by the petition of these stockholders. Moreover, as this court cannot rightly determine the questions relating to the costs to be taxed at this time, as there are established rules of practice concerning them and as directions to the court below to open and try new issues might, and probably would, prolong this litigation through several years more, our conclusion is that our just course is to leave the taxation of costs to the court below under the principles, rules, and practice in equity." And, " as a conclusion of the whole matter," it gave directions for the entry of a specific decree with "costs."

And the court adjudged that the decree of the lower court be reversed and remanded the case "with directions to render a decree for the Trust Company in accordance with the views expressed in the opinion of this Court." The Southern Company appealed but did not raise any question concerning costs. And there was no cross-appeal. February 21, 1916, this court affirmed the decree of the Circuit Court of Appeals. 240 U. S. 166. The mandate set out the decree below, ordered that it be affirmed and remanded the case to the District Court.

April 15, 1916, pending exact determination of the amount conceded to be payable under the decree, the Southern Company paid $821,623.28 to the Trust Company. Later the payment being found in excess of the

amount required, the difference was adjusted. April 18, 1916, the mandate was filed in the District Court. October 4, 1922, the Trust Company applied to have final decree entered, and claimed not only such costs as are taxable as between party and party but also counsel fees and other expenses as costs between solicitor and client. The court construed the opinion of the Circuit Court of Appeals to find that in carrying on this litigation there was lack of good faith and a purpose on the part of the Southern Company to despoil the Trust Company, held itself bound by such findings, and interpreted the decree to require it to ascertain and tax against the Southern Company counsel fees and other expenses incurred by the Trust Company in making its defenses.

A special master was appointed to ascertain and report the amount of such expenses. The Trust Company presented items of its demand in two groups. The first included those claimed to be taxable as between party and party; the second included other expenses amounting to $319,829.97 of which $299,137.30 was attorneys' fees, the balance being to cover printing briefs, services of experts, miscellaneous and incidental disbursements. The master found the costs taxable as between party and party and as to that there is no controversy here. He also found the Trust Company entitled to counsel fees and other expenses amounting to $296,520.37 to be taxed as costs between solicitor and client. After hearing upon exceptions the court, contrary to its earlier decision, held that the proper construction of the decree of the Circuit Court of Appeals limited recovery of costs to those taxable between party and party, and entered decree accordingly.

The Trust Company again appealed. The Circuit Court of Appeals, apparently assuming that its decree and the mandate of this court authorized the District Court to allow the Trust Company costs as between solicitor and client, reversed the decree. 28 F. (2d) 233. It

referred to the character of the litigation, held that federal courts of equity have jurisdiction to allow such costs, citing the practice in the High Court of Chancery in England as applicable here, concluded that the Trust Company is entitled to such an allowance and remanded the case with directions to the lower court to make proper allowances for costs as between solicitor and client.

Did the mandate of this court authorize the District Court to make any allowance in favor of the Trust Company on account of attorneys' fees and other expenses to be taxed as costs between solicitor and client?

The decree here affirmed required the "taxation of costs . . . under the principles, rules and practice in equity." It undoubtedly covered ascertainment of amounts taxable between party and party. There was no specific reference to any additional allowance. The language used disclosed no intention to require more than the usual taxation. When used in a judgment or decree without qualification, the word "costs" means the amounts taxable as such under Acts of Congress, rules promulgated by its authority and practice established consistently with governing enactments. *Newton* v. *Consolidated Gas Co.*, 265 U. S. 78, 83. *Ex parte Peterson*, 253 U. S. 300, 316. In actions at law costs follow the result as of course, but in equity costs not otherwise governed by statute are given or withheld in the sound discretion of the court according to the facts and circumstances of the case. The nominal amounts fixed by statute (28 U. S. C., §§ 571, 572) and taxable as attorneys' fees are not meant to cover the compensation to which lawyers in charge of the litigation are reasonably entitled. A decree merely allowing costs to be taxed does not mean that anything is to be included on account of counsel fees in addition to the amount specified in the statute. Even if it be assumed that federal equity courts have jurisdiction to allow costs as between solicitor and client and to include

therein attorneys' fees in excess of the amount prescribed by statute—and as to that we express no opinion—the purpose to authorize such costs and to make such allowance should be clearly expressed in the decree. 2 Daniell's Chancery Pleading and Practice, 6th Ed., p. 1410.

For the proper construction of the decree under consideration, regard is to be had to the issues before the court on appeal, the findings applied for and the directions given. The proposed findings and additional recovery extended to matters not before the court. The costs taxable as between party and party were involved on the appeal and the court reversed the decree of the lower court which charged one-third against the Trust Company. No question of costs as between solicitor and client had been raised below. No issue of bad faith had been framed, and no such charge was suggested until after the filing of the first opinion. The stockholders' second application, made pending rehearing, contained the first request for a finding of fact on which to base a decree for allowance of attorneys' fees and other expenses to the Trust Company. As there was no appeal by the Belt Company or the Southern Company, the merits of the claims on which they sought recovery against the Trust Company were not before the court.

The lateness of the application, the lack of evidence and danger of injustice mentioned in the opinion were good reasons why the court should deny the application. The suggested danger of prolonging the litigation by trial of new issues was a reason for refusing to direct the lower court to open the case and to make the requested determinations. The failure of the court to make the requested special finding, to adopt the alternative suggestion or to take any action in reference to the parts of the application relating to the Trust Company's damages and expenses in the injunction suits goes to show a purpose to deny any recovery of expenses in addition to the costs

which under established practice are taxable as between party and party. And the opinion makes it clear that the decree directed to be entered below was intended to be an end of the whole matter. It is plain that the stockholders' application was denied and that the decree did not authorize or permit the taxation of costs as between solicitor and client.

The mandate required the execution of the decree. The District Court could not vary it or give any further relief. *In re Sanford Fork & Tool Co.*, 160 U. S. 247, 255. *Gaines* v. *Rugg*, 148 U. S. 228, 241. *In re Washington & Georgetown R. Co.*, 140 U. S. 91, 96. *Ex parte Union Steamboat Company*, 178 U. S. 317, 319. That court was right in holding that, by the decree of the Circuit Court of Appeals and the mandate of this court, the costs recoverable by the Trust Company were limited to those taxable between party and party.

Decree of the Circuit Court of Appeals reversed and that of the District Court affirmed.

LUCAS, COMMISSIONER OF INTERNAL REVENUE, *v.* NORTH TEXAS LUMBER COMPANY.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 92. Argued January 15, 16, 1930.—Decided February 24, 1930.

An option offered by one corporation to another to buy lands at a specified price was accepted late in 1916 by a notice from the vendee, in which it declared itself ready to close the transaction and pay the price as soon as the transfer papers were prepared by the vendor. The vendor did not prepare the papers, transfer or tender title or possession, or demand or receive the purchase price, until early in 1917, when the transaction was closed. *Held* that, as unconditional liability of the vendee was not created in 1916, the vendor, though it kept its accounts on the accrual basis, was not

entitled under §13 (d) of the 1916 Revenue Act to enter the purchase price as income of that year and to make return and have the tax computed on that basis, which clearly did not reflect 1916 income. P. 13.

30 F. (2d) 680, reversed.

CERTIORARI, 280 U. S. 538, to review a judgment of the Circuit Court of Appeals, which reversed an order of the Board of Tax Appeals, 7 B. T. A. 1193, sustaining a finding of the Commissioner of Internal Revenue.

Solicitor General Hughes, with whom *Assistant Attorney General Youngquist, Messrs. Randolph C. Shaw* and *J. Louis Monarch,* Special Assistants to the Attorney General, *C. M. Charest,* General Counsel, and *Shelby S. Faulkner,* Special Attorney, Bureau of Internal Revenue, were on the briefs, for the petitioner.

Mr. Albert B. Hall, with whom *Mr. Joseph J. Eckford* was on the brief, submitted for respondent.

MR. JUSTICE BUTLER delivered the opinion of the Court.

The respondent, a Texas corporation, for some time prior to 1917 was engaged in operating a sawmill, selling lumber and buying and selling timber lands. December 27, 1916, it gave to the Southern Pine Company a ten day option to purchase its timber lands for a specified price. The latter was solvent and able to make the purchase. On the same day title was examined and found satisfactory to the Pine Company. It arranged for the money needed and December 30, 1916, notified respondent that it would exercise the option. On that day respondent ceased operations and withdrew all employees from the land. January 5, 1917, the papers which were required to effect the transfer were delivered, the purchase price was paid and the transaction was finally closed.

Respondent kept its accounts on the accrual basis and treated the profits derived from the sale as income in 1916. The Commissioner of Internal Revenue determined that the gain had been realized in, and was taxable for 1917. The Board of Tax Appeals sustained his finding. 11 B. T. A. 1193. The Circuit Court of Appeals reversed the Board. 30 F. (2d) 680.

The gain derived from this sale was taxable income.[1] If attributed to 1916 the tax would be much less than if made in 1917.[2] Section 13 (d) of the Revenue Act of 1916 provided that a corporation keeping its accounts upon any basis other than that of actual receipts and disbursements, unless such other basis failed clearly to reflect income, might make return upon the basis upon which its accounts were kept and have the tax computed upon the income so returned.[3]

An executory contract of sale was created by the option and notice, December 30, 1916. In the notice the purchaser declared itself ready to close the transaction and pay the purchase price "as soon as the papers were prepared." Respondent did not prepare the papers necessary to effect the transfer or make tender of title or possession or demand the purchase price in 1916. The title and right of possession remained in it until the transaction was closed. Consequently unconditional liability of vendee for the purchase price was not created in that year. *Gober* v. *Hart,* 36 Texas 139. Cf. *United States* v. *Anderson,* 269 U. S. 422, 441. *American National Company* v. *United States,* 274 U. S. 99. The entry of the purchase price in respondent's accounts as income in that year was not warranted. Respondent was not entitled

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[1] § 2 (a), Act of September 8, 1916, 39 Stat. 756, 757. § 1200, Act of October 3, 1917, 40 Stat. 300, 329.

[2] § 10, Act of September 8, 1916, 39 Stat. 756, 765. § 201, Act of October 3, 1917, 40 Stat. 300, 303.

[3] 39 Stat. 756, 771.

to make return or have the tax computed on that basis, as clearly it did not reflect 1916 income.

Judgment reversed.

CHICAGO & NORTH WESTERN RAILWAY COMPANY *v.* LINDELL.

CERTIFICATE FROM THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 193. Argued January 23, 1930.—Decided February 24, 1930.

1. Where the state law permits adjustment of the defendant's demand by counterclaim in the plaintiff's action, its adjustment by that method rather than by independent s is to be encouraged in the federal courts. Pp. 16–17.
2. The practice of determining claims of shippers for loss or damage in suits brought by carriers to collect the transportation charges, is not repugnant to the rule of the Hepburn Act prohibiting the payment of such charges otherwise than in money. P. 17.
3. That Act ought not to be construed to put aside state laws and long established practice in respect of pleading in the absence of any plain intention of Congress to do so. P. 18.

ANSWER to a question certified by the Circuit Court of Appeals upon review of a judgment of the District Court allowing the loss suffered by the defendant through damage to an interstate shipment to be set off in an action by the carrier for the transportation charges.

Mr. Nelson Trottman, with whom *Messrs. Samuel H. Cady* and *Aaron M. Sargent* were on the brief, for the Chicago & North Western Railway Company.

Mr. F. DeJournel submitted for Lindell.

MR. JUSTICE BUTLER delivered the opinion of the Court.

October 17, 1925, appellee delivered to the railroad of the Southern Pacific Company at Kingsburg, California, a shipment of grapes for transportation to Chicago for

delivery to a named consignee. The appellant received the car at Omaha, hauled it to Chicago and there delivered it to the consignee without collecting the freight and other charges which amounted to $683.79. Because of unreasonable delay on the part of appellant and its failure to use reasonable care to keep the car properly iced, the grapes were delivered in a damaged condition. Appellant sued in the United States District Court for the Southern District of California to recover such charges. And appellee by answer set up the loss. While claiming to have suffered damages of $1,011.70, he asked no affirmative relief but only that the loss be held to be a set-off against appellant's claim. The court allowed the set-off.

The Circuit Court of Appeals, under § 239 of the Judicial Code, 28 U. S. C., § 346, certified to this court the following question:

"Where an interstate railroad carrier delivers to the consignee at destination a consignment of freight without collecting the transportation and other lawful charges and thereafter brings an action at law to recover from the shipper the amount thereof, in a United States court in a district where the state law provides that if a defendant omits to set up a counterclaim arising out of the transaction constituting the foundation of the plaintiff's claim he cannot thereafter maintain an action upon the same, and, further, that where such cross-claims have existed 'the two demands shall be deemed compensated,' is the shipper, acting in good faith and without collusion, debarred by the Interstate Commerce Acts, particularly the Hepburn Act (34 Stat. 587) from pleading, by way of set-off, a counterclaim for a loss suffered by him as a result of the carrier's failure to perform its obligations touching the transportation and delivery of the identical shipment?"*

* There are conflicting decisions on the question. The following support an answer in the affirmative: *Fullerton Lumber Co.* v. *Chi-*

The appellant is liable to the appellee for damages in an amount at least equal to the charges sued for. 49 U. S. C., § 20 (11). And unless the Hepburn Act stands in the way, the shipper has the right, under established practice in California, to set up his loss as a counterclaim. 28 U. S. C., § 724. California Code of Civil Procedure, §§ 437, 438, 439, 440. *Payne* v. *Clarke*, 271 Fed. 525.

The provision follows: ". . . nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, . . . than the rates, fares, and charges which are specified in the tariff . . .; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs." 49 U. S. C., § 6 (7).

The purpose of the Act to prevent discrimination has been emphasized by this court and is well known. Since

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cago, M., St. P. & P. R. Co., 36 F. (2d) 180; *Illinois Central R. Co.* v. *Hoopes*, 233 Fed. 135; *C. & N. W. Ry. Co.* v. *Stein Co.*, 233 Fed. 716; *Johnson-Brown Co.* v. *Railroad*, 239 Fed. 590; *Pennsylvania R. Co.* v. *South Carolina Produce Ass'n*, 25 F. (2d) 315; *D., L. & W. R. R. Co.* v. *Nuhs Co.*, 93 N. J. Law 309; *Adams Express Co.* v. *Albright Bros.*, 75 Pa. Super. Ct. 410.

And the following in the negative: *Wells Fargo & Co.* v. *Cuneo*, 241 Fed. 727; *C. & N. W. Ry. Co.* v. *Tecktonius Mfg. Co.*, 262 Fed. 715; *Payne* v. *Clarke*, 271 Fed. 525; *C., M. & St. P. Ry. Co.* v. *Pioneer Grain Corp.*, 26 F. (2d) 90; *Battle* v. *Atkinson*, 9 Ga. App. 488; *Central of Georgia Ry. Co.* v. *Birmingham Sand & Brick Co.*, 9 Ala. App. 419; *Nashville, C. & St. L. Ry.* v. *Tennessee Mill Co.*, 143 Tenn. 237; *Penn. R. Co.* v. *Bellinger*, 101 Misc. Rep. 105; *N. Y. Cent. R. Co.* v. *Federal Sugar Co.*, 201 App. Div. 467.

its enactment carriers may not accept services, advertising, property or a release of claim for damages in payment for transportation. They are required to collect the established rates, charges and fares from all alike in cash. *Louisville & Nashville R. R.* v. *Mottley,* 219 U. S. 467. *Chicago, Ind. & L. Ry. Co.* v. *United States,* 219 U. S. 486. *Lake & Export Coal Corp.* v. *Chesapeake & Ohio Ry. Co.,* 1 F. (2d) 968. *State* v. *Union Pacific R. R. Co.,* 87 Neb. 29.

The adjustment of defendant's demand by counterclaim in plaintiff's action rather than by independent suit is favored and encouraged by the law. That practice serves to avoid circuity of action, inconvenience, expense, consumption of the courts' time, and injustice. *Rolling Mill Co.* v. *Ore & Steel Co.,* 152 U. S. 596, 615, 616. *Railroad Company* v. *Smith,* 21 Wall. 255, 261. *Partridge* v. *Insurance Company,* 15 Wall. 573, 579. In the case last mentioned the Court, speaking through Mr. Justice Miller, said (p. 580): "It would be a most pernicious doctrine to allow a citizen of a distant State to institute in these courts a suit against a citizen of the State where the court is held and escape the liability which the laws of the State have attached to all plaintiffs of allowing just and legal set-offs and counterclaims to be interposed and tried in the same suit and in the same form."

The practice of determining claims of shippers for loss or damage in suits brought by carriers to collect transportation charges is not repugnant to the rule prohibiting the payment of such charges otherwise than in money. The adjudication in one suit of the respective claims of plaintiff and defendant is the practical equivalent of charging a judgment obtained in one action against that secured in another. Neither is to be distinguished from payment in money.

It is well understood that payment by carriers to shippers under the guise of settling claims for loss and damage may in effect constitute discrimination that the Act was intended to prevent. But it is not suggested how opportunity for collusion in respect of such matters would be lessened by abolishing counterclaims in cases such as this. Collusion and fraud may be practiced in the defense and settlement of separate actions brought on such claims as well as when the same matters are put forward as offsets or counterclaims.

The Act ought not to be construed to put aside state laws and long established practice in respect of pleading unless the intention of Congress so to do is plain. There appears no reasonable probability that the relegation of shippers to separate actions for the enforcement of their claims for loss or damage would operate more effectively to enforce the purpose of Congress to prevent discrimination. There is no substantial ground upon which the Act may be given the construction for which the carrier contends.

The question is answered

No.

MOORE, TREASURER OF GRANT COUNTY, INDIANA, *v.* MITCHELL, ET AL., EXECUTORS.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 79. Argued January 14, 1930.—Decided February 24, 1930.

A state tax officer, claiming only by virtue of his office and authorized only by the laws of his State, has no legal capacity to sue, for the collection of taxes due to his State, in a federal court in another State. P. 23.

30 F. (2d) 600, affirmed.

CERTIORARI, 279 U. S. 834, to review a judgment of the Circuit Court of Appeals which affirmed a judgment of

the District Court, 28 F. (2d) 997, dismissing the complaint in an action to recover delinquent taxes.

Mr. Henry M. Dowling, with whom *Mr. Russell H. Robbins* was on the brief, for petitioner.

Transitory causes of action of a civil nature are enforcible in the courts of another jurisdiction, in absence of an adverse public policy of such jurisdiction.

The exception against penal liabilities should not be extended to include civil liabilities arising under revenue laws.

Distinguishing: *Colorado* v. *Harbeck,* 232 N. Y. 71; *Municipal Council of Sydney* v. *Bull,* (1909) 1 K. B. 7; *Gulledge Bros. Lumber Co.* v. *Wenatchee Land Co.,* 122 Minn. 266; *Attorney General for Canada* v. *William Schulze & Co.,* 9 Scots Law Times (1901–1902) 4; *Wisconsin* v. *Pelican Ins. Co.,* 127 U. S. 265, 291; *Boston & M. R. Co.* v. *Hurd,* 108 Fed. 116; *Malloy* v. *American Hide & Leather Co.,* 148 Fed. 482.

Since the federal courts enforce revenue laws of the States in which they sit, it follows that they should equally enforce revenue laws of other States. *Tennessee* v. *Whitworth,* 117 U. S. 129; *Supervisors* v. *Rogers,* 7 Wall. 175, 180; *In re Stutsman County,* 88 Fed. 337; *Bristol* v. *Washington County,* 177 U. S. 133.

Under section 64a of the Bankruptcy Law, state taxes have been allowed and paid in districts located outside the taxing State; the federal courts refusing to confine the statute to local taxes only. *In re United Five and Ten Cent Store, Inc.,* 242 Fed. 1005; *In re Thermiodyne Radio Corp.,* 26 F. (2d) 716.

Refusal to enforce revenue laws extraterritorially has its origin in conditions of commercial rivalry between nations. The reasons underlying such refusal are wholly inapplicable as between the nation and its constituent States. 29 Columbia L. Rev., No. 6, 782; *Henry* v. *Sargeant,* 13 N. H. 321.

Personal property taxes, under the laws of Indiana, were due and became the personal obligation of taxpayers in each year, whether or not the amount thereof had been fixed by assessment.

The conception of tax liability entertained by the federal courts and by the courts of Indiana differs from the conception entertained by certain of the state courts. Under the former conception, at least, no principle of law prevents suit in a jurisdiction extraneous to the taxing jurisdiction.

In Indiana these taxes are debts. *Mullikin* v. *Reeves,* 71 Ind. 281, 284; *Funk* v. *State,* 166 Ind. 455, 457; *Darnell* v. *State,* 174 Ind. 143; *Prudential Casualty Co.* v. *State,* 194 Ind. 542.

The federal rule is illustrated in *Billings* v. *United States,* 232 U. S. 261, where the tax was federal; but the reasoning applies equally to suits for state taxes. The nature of the obligation is determined primarily by the enacting State. See also *United States* v. *Chamberlin,* 219 U. S. 250.

Extraterritorial imposition of tax liability must be distinguished from extraterritorial enforcement of such liability. The latter is constitutionally unobjectionable.

Mr. Louis Connick, with whom *Messrs. Graham Sumner, Whitney North Seymour* and *Francis H. Horan* were on the brief, for respondents.

The American authorities in both federal and state courts universally recognize the principle of private international law which forbids the enforcement by one sovereign of the revenue laws of another. *Meriwether* v. *Garrett,* 102 U. S. 472, 513–514; *Wisconsin* v. *Pelican Insurance Co.,* 127 U. S. 265, 290; *Ashley* v. *Ryan,* 153 U. S. 436; *New York Trust Company* v. *Island Oil & Transport Corp.,* 11 F. (2d) 698; *Colorado* v. *Harbeck,* 232 N. Y. 71; *In re Bliss,* 121 Misc. 773; *Maryland* v. *Turner,* 75 Misc.

9; *Heine* v. *Levee Commissioners,* 86 U. S. 655; *Rees* v. *City of Watertown,* 86 U. S. 107; *Arkansas* v. *Bowen,* 20 App. D. C. 291; *Henry* v. *Sargeant,* 13 N. H. 321, 332.

The English decisions without exception recognize the same rule. *In re Visser* (1928), 1 Ch. 878; *Municipal Council* of *Sydney* v. *Bull,* (1909), 1 K. B. 7; *Attorney General for Canada* v. *William Schulze & Co.,* 9 Scots Law Times Rep. 4 (1901); *City of Regina* v. *McVey,* 23 Ont. W. N. 32; *Holman* v. *Johnson,* 1 Cowp. 341 (1775); *The Emperor of Austria* v. *Day and Kossuth* (1861), 3 De Gex, F. & J., 217, 241–242; *Huntington* v. *Attrill* (1893), A. C. 150; *Cotton* v. *Rex,* L. R. 1914, A. C. 176; *Indian & Gen. Investment Trust* v. *Borax Consolidated, Ltd.* (1920), 1 K. B. 539, 550.

Adoption of a contrary rule would flood the federal courts with actions by taxing authorities whose neglect and delinquency could not otherwise be repaired. If the federal court in New York were required to take jurisdiction it would also result in an intolerable uncertainty in the administration of estates in New York and States following the rule announced in New York.

While the function of the federal court sitting in New York has perhaps not been defined for all purposes, the origin of the federal judicial system suggests that that court was designed to be an impartial tribunal, free from local prejudice against citizens from other States, administering the law of New York as conceived by the federal courts sitting in New York insofar as the Constitution and statutes of the United States do not require a different law to be administered. If the federal court sitting in New York has any duty to co-operate, or if there is any federal policy indicating that it should co-operate with the States, it would seem reasonable that, in the absence of controlling federal law to the contrary, the federal court sitting in New York should first concern itself with co-operation with the State in which it sits.

A fundamental distinction exists between the duties and powers of a federal court in the taxing State and one sitting elsewhere.

It seems plain that the attempt to assess taxes in this case did not result in an imposition of a valid tax liability. This was the view taken by two of the judges in the Circuit Court of Appeals, but it is unnecessary at this time to determine that question unless this Court feels that the rule of international law applied in the courts below should be abrogated.

This action is and remains an action to collect taxes alleged to be due to the plaintiff in his official capacity. It is necessarily, therefore, an attempt to enforce a revenue law against persons and property which were not within the State of Indiana at the time of the alleged assessment.

Mr. Justice Butler delivered the opinion of the Court.

Petitioner is the county treasurer of Grant county, Indiana. Respondents are the executors named in the will of Richard Edwards Breed, appointed by the Surrogate's Court in the county and State of New York and there engaged in the administration of his estate. Petitioner as such treasurer brought this suit in the United States District Court for the Southern District of New York to recover $958,516.22 claimed as delinquent taxes. The respondents moved to dismiss on the grounds that the complaint failed to state a cause of action, that the court had no jurisdiction of the subject matter, and that petitioner had not legal capacity to sue. The court declined jurisdiction and entered a decree dismissing the complaint. 28 F. (2d) 997. The Circuit Court of Appeals affirmed. 30 F. (2d) 600.

From 1884 until his death on October 14, 1926, the testator was a resident and citizen of Grant county, Indi-

ana. During the last 24 years of that period he owned stock of corporations and other intangible property in respect of which there had been no return, assessment or payment of taxes. After testator's death the county auditor, acting, as it is alleged, under authority of the statutes of Indiana, ascertained the value in each year of the omitted property, assessed taxes thereon for state, county, city, and township purposes and charged the same against such property and the executors. By the statutes of Indiana (§ 14,299, Burns' Statutes, 1926,) it is made the duty of the treasurer of each county to collect the taxes imposed therein for county, city and other purposes. By § 1, c. 54, Session Laws of 1927, county treasurers are authorized "to institute and prosecute to final judgment and execution, all suits and proceedings necessary for the collection of delinquent taxes owing by any person residing outside of the State of Indiana or by his legal representatives . . . " The recovery here sought is for Grant county, the city of Marion and the other political subdivisions therein of which the testator was a resident during the years for which such assessments were made.

The first question for consideration is whether petitioner had authority to bring this suit.

The United States District Court in New York exercises a jurisdiction that is independent of and under a sovereignty that is different from that of Indiana. *Grant* v. *Leach & Company,* 280 U. S. 351. *Pennoyer* v. *Neff,* 95 U. S. 714, 732. And, so far as concerns petitioner's capacity to sue therein, that court is not to be distinguished from the courts of the State of New York. *Hale* v. *Allinson,* 188 U. S. 56, 68.

Petitioner claims only by virtue of his office. Indiana is powerless to give any force or effect beyond her own limits to the Act of 1927 purporting to authorize this suit

or to the other statutes empowering and prescribing the duties of its officers in respect of the levy and collection of taxes. And, as Indiana laws are the sole source of petitioner's authority, it follows that he had none in New York. Mechem, Public Offices and Officers, § 508. *State* v. *Scott,* 182 N. C. 865, 873. He is the mere arm of the State for the collection of taxes for some of its subdivisions and has no better standing to bring suits in courts outside Indiana than have executors, administrators, or chancery receivers without title, appointed under the laws and by the courts of that State. It is well understood that they are without authority, in their official capacity, to sue as of right in the federal courts in other States. From the earliest time, federal courts in one State have declined to take jurisdiction of suits by executors and administrators appointed in another State. *Dixon's Executors* v. *Ramsay's Executors,* 3 Cranch 319, 323. *Kerr* v. *Moon,* 9 Wheat. 565, 571. *Vaughan* v. *Northup,* 15 Pet. 1, 5. And since the decision of this Court in *Booth* v. *Clark,* 17 How. 322, it has been the practice in federal courts to limit such receivers to suits in the jurisdiction in which they are appointed. *Great Western Mining Co.* v. *Harris,* 198 U. S. 561, 578. *Converse* v. *Hamilton,* 224 U. S. 243, 257. *Sterrett* v. *Second National Bank,* 248 U. S. 73, 76. The reasons on which rests this long established practice in respect of executors, administrators and such receivers apply with full force here. We conclude that petitioner lacked legal capacity to sue.

It is not necessary to express any opinion upon the question considered below, whether a federal court in one State will enforce the revenue laws of another State.

Decree affirmed.

DISTRICT OF COLUMBIA *v.* THOMPSON.

CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 44. Argued December 4, 1929.—Decided February 24, 1930.

Pursuant to an Act of Congress, the Commissioners of the District of Columbia condemned a strip of land for the extension of a street, and levied and collected a special assessment of benefits for the contemplated improvements. Fourteen years elapsed during which time the District neither made the extension nor took any steps towards that end. It showed no obstacle which had prevented the extension; it had built a sidewalk and curb across the strip which constituted an obstruction to vehicular traffic; and it made no claim in its pleading and proof that it desired or intended to make such extension at any future time. Upon review of a judgment for the plaintiff in an action to recover the sum of $200 thus assessed as benefits and paid to the District, *held:*

1. That the District had abandoned the purpose for which the special assessment was levied and collected. P. 32.

2. That the District was properly required to return to the plaintiff, as for failure of consideration, the amount of the assessment paid. P. 31.

3. That the action was one within the jurisdiction of the Municipal Court of the District of Columbia, as a claim for debt arising out of an implied contract. P. 33.

4. That plaintiff's right of action was not barred by limitation of three years, since the claim accrued not at the time when the assessment was confirmed or was paid, but rather at the time of the abandonment of the project. P. 34.

30 F. (2d) 476, affirmed.

CERTIORARI, 279 U. S. 829, to review a decision of the Court of Appeals of the District of Columbia affirming a judgment of the Municipal Court in an action against the District to recover the amount of a special assessment of benefits for contemplated improvements which were subsequently abandoned.

Mr. Alexander H. Bell, Jr., Assistant Corporation Counsel, with whom *Mr. William W. Bride,* Corporation Counsel, District of Columbia, was on the brief, for the petitioner.

The record fails to disclose a single instance where the Commissioners "have expressed by word or action an intention not to exercise the power so delegated." On the contrary, they have taken no action looking to the abandonment of the street. There is nothing in the case, therefore, to support a finding of fact that the Commissioners had abandoned the project.

The Commissioners are merely ministerial officers deriving their powers solely through special grant by Congress, and Congress having once directed them to extend Lamont Street, it is absolutely beyond their power to alter or disregard such direction.

The verdict of condemnation having been ratified on February 3, 1913, the claim is barred.

If, on the other hand, the acceptance by the Collector of Taxes of the amount involved constituted a new promise to pave and improve Lamont Street, the limitation had been exceeded by three months when the suit was filed in the Municipal Court.

Mr. William E. Furey, with whom *Mr. Paul V. Rogers* was on the brief, for respondent.

All the elements of proof generally accepted by the courts of this country as tending to establish abandonment were before the trial court. *Valentine* v. *St. Paul,* 34 Minn. 446; *Bradford* v. *Chicago,* 25 Ill. 349; *McConville* v. *St. Paul,* 75 Minn. 393; *San Antonio* v. *Walker,* 56 S. W. 952; *Neer* v. *Salem,* 149 Pac. 478; *San Antonio* v. *Peters,* 40 S. W. 827.

Time is an important element on the question of abandonment and particularly goes to the intent to abandon.

The lapse of time alone may be sufficient; and a lapse of time with slight circumstances may likewise be sufficient to establish abandonment. *Holt* v. *Sargent,* 15 Grey (Mass.) 97; *Harkrader* v. *Carroll,* 76 Fed. 474; *Johnson* v. *Rasmus,* 237 Mo. 586; *Burke* v. *Bishop,* 175 Fed. 167; *Smith* v. *Gorrell,* 81 Ia. 218.

The present case clearly falls within the doctrine of abandonment by acts *in pais.* The argument that abandonment, to be effective, must be based on formal renunciation by the proper officials of the municipality, is obviously fallacious. Such a rule of law would permit the municipality indefinitely to conceal its true intention behind a cloak of silence, and thereby preclude a taxpayer from the assertion of a just claim.

The taking of respondent's money, being based on the realization by her of an equivalent benefit to her land, is a matter cognizable by a court of law, and in a case such as the present the doctrine of estoppel operates to preclude any defense based on the limited authority of individual public officers, where the grievance complained of flows from the corporation itself.

The levying and collecting of special assessments in anticipation of a street improvement must be considered as raising a condition that the purpose for which the assessment is levied and collected will be carried out. It is the violation of this condition, and not the breach of a supposed contract, which gives rise to respondent's right to recover back the assessment paid. Such being the case, we submit that the statute of limitations commences to run from a breach of the condition after notice of such breach can reasonably be imputed to the respondent. *American Security & Trust Co.* v. *Rudolph,* 38 App. D. C. 42. When the purpose for which the land in question was condemned is abandoned a right immediately accrues to the taxpayer to recover the amounts so paid. Any other

conclusion would sanction the taking of private property for public use without compensation.

MR. JUSTICE SANFORD delivered the opinion of the Court.

Pursuant to an Act of March 1, 1912,[1] authorizing and directing them so to do, the Commissioners of the District of Columbia instituted in the Supreme Court of the District, under and in accordance with the District Code of Law, a proceeding *in rem* to condemn the land necessary to extend Lamont Street, northwest, with a width of ninety feet, through two designated squares west of its termination at 19th Street.[2] The strip of land necessary for this extension was condemned and title vested in the District, and the damages were awarded and the benefits assessed by a verdict of the jury. This was confirmed by the court in February, 1913. The sum of $200 was assessed as benefits against a lot owned by the respondent, Georgiana Thompson. Under the District Code this became a lien upon the lot, collectible as special improvement taxes and payable in five annual instalments.[3] In March, 1921, the lot was sold for nonpayment of the assessment, and in March, 1923, was redeemed by the respondent from such sale by the payment of the $200 and interest to the Collector of Taxes of the District.

In June, 1927, the respondent—hereinafter called the plaintiff—brought an action against the District in the Municipal Court, alleging that she had paid the assessment of benefits under obligation of law; that the District had wholly failed to extend Lamont Street through the

[1] 37 Stat. 71, c. 48.

[2] The Act specifically provided that the amount awarded by the jury as damages for the land condemned for the extension, plus the costs and expenses of the proceeding, should be assessed by the jury as benefits.

[3] District Code of Law, § 491(j).

designated squares, the strip of land condemned being yet unimproved by a street extension, and had abandoned the purpose of the condemnation authorized by the Act of Congress; and that she was entitled to the repayment of the $200 assessment—for which she claimed judgment. The District filed a plea to the jurisdiction of the court over the cause of action; and also an affidavit of defense, denying that it had abandoned the purpose of the condemnation for the extension of Lamont Street, and alleging that more than three years had elapsed since the time when the plaintiff's right of action, if any, had accrued to her. It was not alleged that the District intended to extend Lamont Street over the condemned strip at any future time.

At the trial the following facts—which are undisputed—were shown: Lamont Street, when the condemnation proceeding for its extension was instituted, had been paved, graded and laid out, east of 19th Street, with a roadway, sidewalks, curbing and parking spaces, and was open for vehicle and pedestrian traffic. Since the acquisition of the strip west of 19th Street and the confirmation of the verdict in 1913, no official action had been taken by the Commissioners or by Congress looking to the abandonment of the title thereto, or of the right of the District to improve it. However, since that time and up to the filing of the plaintiff's suit in 1927, Lamont Street had not been extended as an improved street, and the condemned strip had not been laid out for a roadway, sidewalk or parking space, nor graded, paved or otherwise improved for highway purposes; nor had Congress made any specific appropriation therefor. And although lying between two improved highways, 19th Street and Adams Mill Road, it still remained open, vacant property. For a short distance along its south side, at a time not shown, a cement sidewalk had been laid by a private person as an entrance to an apartment house, under a District per-

mit. In March, 1924, the District had laid a cement sidewalk and curb along the west side of 19th Street and across the east end of the condemned strip, which constituted an effective obstruction to any vehicular traffic over it. And in January, 1926, in a letter declining to entertain an application made by the attorney for the plaintiff and others for a refund of the assessments on the ground that the District appeared to have abandoned the project for the extension of the street, the Auditor of the District had stated that the official files of the engineer department indicated that it had never been the intention to open the extension of Lamont Street to vehicular traffic because of the excessive grade, but that the principal reason for condemning the strip was to provide a vista and access to Zoological Park, and it was intended to treat the extension with terraces and steps.[4] It was not shown that the District had taken any step at any time looking towards the extension of Lamont Street over the condemned strip, or indicating its intention to make such extension at any future time.

The Municipal Court gave judgment for the plaintiff; and this, on writ of error, was affirmed by the Court of Appeals of the District. 30 F. (2d) 476.

We think the judgment should be affirmed.

1. Pursuant to the Act of Congress the strip of land was condemned for the extension of Lamont Street, an improved thoroughfare open for vehicular and pedestrian traffic and all the ordinary uses of a street. In the condemnation proceeding the jury were necessarily required

[4] This letter was introduced by the plaintiff and admitted over the defendant's objection, to show her first knowledge that the defendant intended to abandon or had abandoned the purpose of the condemnation; but the defendant's exception to the overruling of its objection was not brought up by any assignment of error in the Court of Appeals.

to assess the benefits which would accrue from such extension, that is, from the extension of a street where one had not theretofore existed, and not from an unimproved strip of land merely. See *Washington R. & E. Co.* v. *Newman,* 41 App. D. C., 439, 445; and cases cited. That is, the consideration for the assessment of the benefits was the extension of Lamont Street over the condemned strip.

2. Under the undisputed facts we think the District was under an obligation imposed by law to return, as for a failure of consideration, the assessment of benefits that had been paid by the plaintiff.

In *Valentine* v. *City of St. Paul,* 34 Minn. 446, 448, benefits had been assessed against the plaintiff's land by reason of the proposed opening and extension of a street, and he had been compelled to pay the amount of this assessment to redeem his land from sale. No part of the street having been opened, and the project for opening and extending it having been abandoned by the city, he was held entitled to recover the amount paid as upon a failure of the consideration for the assessment. The court said that "the effect of the abandonment by the city of the project of 'extending and opening' the proposed street for and on account of which, and which only, the assessment was made, is that the consideration of the assessment has wholly failed. So that the city stands in the position of holding in its treasury money collected from the plaintiff which it has no right in equity, good conscience, or common honesty to retain, because the purpose for which it was collected has been completely abandoned. In such circumstances no statute is required to impose upon the city a legal obligation to make restitution. An action lies as at common law for money had and received . . . That the city is a municipal corporation does not distinguish it from a private person in this respect." To the same effect are *McConville* v. *City of St.*

Paul, 75 Minn. 383, *City of San Antonio* v. *Peters* (Tex. Civ. App.,) 40 S. W. 827, *City of San Antonio* v. *Walker* (Tex. Civ. App.,) 56 S. W. 952, and *Bradford* v. *City of Chicago*, 25 Ill. 411, involving assessments for the opening, extension and widening of streets. And see *Ward* v. *Love County*, 253 U. S. 17, 24, and cases cited.

In two of these cases the abandonment of the proposed street improvement for which the benefits had been assessed, although not shown by any affirmative act on the part of the municipality, was established by circumstances; in one where there had been the lapse of a reasonable time during which the city had done nothing to carry on the improvement, and there was no claim in its answer or proof that it desired or ever intended so to do, *McConville* v. *City of St. Paul*, *supra*, 386; and in the other where there had been the lapse of a reasonable time during which the city had done nothing to carry out the improvement, and there was no proof that it had been prevented by any obstacle in the way thereof, *Bradford* v. *City of Chicago*, *supra*, 417.

Here, although the Commissioners had been instructed by Congress to condemn the strip of land for the extension of Lamont Street, more than fourteen years had elapsed during which the District had neither made this extension nor taken any step towards that end; it showed no obstacle which had prevented such extension; it had built a sidewalk and curb across the strip which constituted an obstruction to vehicular traffic; and it made no claim in its pleadings or proof that it desired or intended to make such extension at any future time. We think that these circumstances established, as a matter of reasonable and necessary inference, the fact that the District had abandoned the purpose of extending the street over the condemned strip; and that, this being so, for

the reasons well stated in the *Valentine* case, the District was properly required to return to the plaintiff, as for failure of consideration, the amount of the assessment that she had paid, which it had retained contrary to equity and good conscience and held, by implication of law, as money had and received to her use.

3. As the basis of the plaintiff's cause of action was the obligation imposed by law upon the District by reason of the failure of consideration for the assessment of benefits, it was one, we think, of which the Municipal Court had jurisdiction as a claim for debt arising out of an "implied" contract, not exceeding $300.[5]

4. Nor was the plaintiff's right of action barred by the statute of limitations of three years.[6] The District contends that the plaintiff's claim accrued either when the verdict of the jury assessing benefits was confirmed in February, 1913, or when she paid the assessment in March, 1923. This contention entirely misconceives the nature of the plaintiff's cause of action, which is not based upon any illegality in the original assessment that would have given rise to any right of action when the benefits were either assessed or paid, but entirely upon the abandonment by the District of the proposed extension. See *City of San Antonio* v. *Walker, supra,* 953. The Court of Appeals held upon the evidence that such right of action did not accrue until January, 1926; and this is not controverted.

The judgment is

Affirmed.

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[5] District Code, § 9; Act of Feb. 17, 1909, 35 Stat. 623, c. 134. [Modified by Act of March 3, 1921, 41 Stat., pt. 1, p. 1310, enlarging jurisdictional amount to $1,000.]

[6] District Code, § 1265.

UNITED STATES FIDELITY & GUARANTY COMPANY *v.* GUENTHER.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

No. 179. Argued January 23, 1930.—Decided February 24, 1930.

1. A statute of Ohio prohibiting the employment of a child under 16 years of age to operate an automobile does not affect the validity of a municipal ordinance making it unlawful for any owner or bailee of a motor vehicle to permit a minor under the age of 18 years to operate the same upon the streets of the city. P. 36.
2. The term "fixed by law" as used in a provision of an automobile insurance policy exempting the insurer from liability where the automobile is operated by a person under the age limit fixed by law, *held* to include valid municipal ordinances as well as statutes. P. 37.
3. A municipal ordinance making it unlawful for any owner or bailee of a motor vehicle to permit a minor under the age of 18 years to operate the same upon the streets of the city, *held* within the meaning of a provision of an automobile insurance policy exempting the insurer from liability where the automobile is being operated by any person "under the age limit fixed by law." P. 38.

31 F. (2d) 919, reversed.

CERTIORARI, 280 U. S. 540, to review a judgment against the insurer on an automobile insurance policy. The case was removed to the District Court from a state court upon the ground of diverse citizenship. The court below affirmed a recovery in the District Court.

Mr. Clinton M. Horn, with whom *Mr. Fred J. Perkins* was on the brief, for petitioner.

Mr. William M. Byrnes, with whom *Messrs. James G. Bachman* and *Eugene Quigley* were on the brief, for respondent.

MR. JUSTICE SANFORD delivered the opinion of the Court.

In February, 1925, the Fidelity & Guaranty Co. issued to Guenther, a resident of Cleveland, Ohio, an automobile insurance policy, insuring him against loss and expense arising from claims upon him for damages in consequence of any accident occurring within the United States or Canada by reason of the use of his automobile and resulting in bodily injuries to another person. The policy provided that it was subject to the express condition that it "shall not cover any liability of the assured while [the automobile is] being operated by any person under the age limit fixed by law or under the age of sixteen years in any event."

In May, while the policy was in force, the automobile was being operated, with Guenther's consent and permission, by a minor seventeen years of age upon the highways and streets of the city of Lakewood, Ohio, and collided with and inflicted personal injuries upon a third person. At that time there was in force in the city of Lakewood an ordinance which made it "unlawful for any owner, bailee, lessee or custodian of any motor vehicle to permit a minor under the age of 18 years to operate or run said motor vehicle upon public highways, streets or alleys in said City of Lakewood."

No statute of the State of Ohio made unlawful the operation of an automobile by minors over sixteen years of age.

The injured person sued Guenther and recovered judgment. Guenther, having paid this judgment, brought an action against the Company on the insurance policy to recover the loss and expense incurred by him in the personal injury suit. This was removed to the Federal District Court for northern Ohio, where Guenther recovered judgment, which was affirmed by the Circuit Court of Appeals. 31 F. (2d) 919.

The sole question presented here is whether, under the terms of the policy, liability of the Company was excluded by reason of the municipal ordinance.

1. We think that within the plain meaning of the policy the operator of the automobile was "under the age limit fixed" by the ordinance. True it is that the ordinance does not fix a general age limit for operators of automobiles. But as the ordinance makes it unlawful for the owner of an automobile to permit a minor under eighteen years of age to operate it, to say that when the owner permits a minor only seventeen years of age to operate it the operator is not "under the age limit fixed" by the ordinance would be merely sticking in the bark.

2. The fact that a State statute prohibits the employment of a child under sixteen years of age to operate an automobile[1] does not affect the validity of the city ordinance. Municipal corporations in Ohio are given "special power to regulate the use of the streets, to be exercised in the manner provided by law," and "the care, supervision and control of public highways, streets," etc.[2] Plainly, the general statute which merely forbids the employment of minors under sixteen years to operate automobiles, does not prevent the city, in the exercise of its delegated power to regulate the use of its streets, from prohibiting the operation of automobiles by minors under eighteen years of age. Such a regulation merely supplements locally the provision of the general statute and is not in conflict with it. Thus, in *Heidle* v. *Baldwin,* 118 Oh. St. 375, 385, the court held that a municipality had the power to adopt regulations as to the use of its streets in addition to those imposed by a state statute, and sustained an ordinance imposing a more onerous obligation upon drivers at intersecting streets than that imposed by the statute.

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[1] Throckmorton's Annotated Code of Ohio, § 13002.

[2] Throckmorton's Annotated Code of Ohio, § 3714.

3. This brings us to the question whether the age limit fixed by the municipal ordinance is one "fixed by law" within the meaning of the policy.

In *Imperial Fire Insurance Co.* v. *Coos County,* 151 U. S. 452, 462, this court said: "It is settled . . . that, when an insurance contract is so drawn as to be ambiguous, or to require interpretation, or to be fairly susceptible of two different constructions, so that reasonably intelligent men on reading the contract would honestly differ as to the meaning thereof, that construction will be adopted which is most favorable to the insured. But the rule is equally well settled that contracts of insurance, like other contracts, are to be construed according to the sense and meaning of the terms which the parties have used, and if they are clear and unambiguous, their terms are to be taken and understood in their plain, ordinary, and popular sense."

Applying that rule here, we think that when the words of the exclusion clause are taken in their ordinary meaning they are free from any ambiguity that requires them to be construed most strongly against the Company. The plain and evident purpose of the clause was to prevent the Company from being held liable for any accident occurring while by reason of the age of the operator the automobile was being operated in violation of law. To that end liability was excluded when the operator was under "the age limit fixed by law." This is not limited to the case where the age limit is fixed by "a law," a specific phrase frequently limited in a technical sense to a statute, which, to say the least, would have involved doubt as to whether a municipal ordinance was included. On the contrary the clause uses the broad phrase "fixed by law," in which the term "law" is used in a generic sense, as meaning the rules of action or conduct duly prescribed by controlling authority, and having binding legal force; including valid municipal ordinances as well as statutes. Thus in

the *Matter of Petition of Mutual Life Insurance Co.*, 89 N. Y. 530, 531, 533, the court held that a street grade fixed and established by an ordinance of the city council, duly authorized thereto, was one "fixed and established by law."

We find no ambiguity in the phrase "under the age limit fixed by law" contained in the exclusion clause of the policy; and think that, by reason of the ordinance, liability on the part of the Company is precluded.

The judgment is

Reversed.

LINDGREN, ADMINISTRATOR, *v.* UNITED STATES ET AL.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

No. 25. Argued October 25, 28, 1929.—Decided February 24, 1930.

1. The Merchant Marine Act establishes as a modification of the prior maritime law a rule of general application in reference to the liability of the owners of vessels for injuries to seamen, and supersedes all state legislation on that subject. P. 44.
2. Where a seaman in the course of his employment suffers injuries resulting in death, but leaves no survivors designated as beneficiaries by the Employers' Liability Act,—made applicable in case of the death of a seaman by § 33 of the Merchant Marine Act,—the administrator is not entitled to maintain an action for the recovery of damages under the provisions of the federal Act, nor may he resort to the death statute of a State, either to create a right of action not given by the Merchant Marine Act, or to establish a measure of damages not provided by that Act. P. 47.
3. Prior to the enactment of the Merchant Marine Act, the maritime law gave no right of recovery for the death of a seaman, although occasioned by negligence of the owner or other members of the crew or by unseaworthiness of the vessel. P. 47.
4. The right of action given by the second clause of § 33 of the Merchant Marine Act to the personal representative to recover damages, for and on behalf of designated beneficiaries, for the

death of a seaman when caused by negligence, is exclusive, and precludes a right of recovery of indemnity for the death by reason of the unseaworthiness of the vessel, irrespective of negligence, notwithstanding that the right be predicated upon the death statute of the State in which the injury was received. P. 48.

28 F. (2d) 725, affirmed.

CERTIORARI, 279 U. S. 827, to review a decision of the Circuit Court of Appeals, which reversed a decree of the District Court allowing a recovery against the United States in an action for the death of a seaman.

Messrs. D. Arthur Kelsey, pro hac vice, by special leave of Court, and *Jacob L. Morewitz,* with whom *Messrs. L. B. Cox* and *R. Arthur Jett* were on the brief, for petitioner.

Mr. Claude R. Branch, Special Assistant to the Attorney General, with whom *Solicitor General Hughes, Assistant Attorney General Farnum* and *Mr. J. Frank Staley* were on the briefs, for the United States.

MR. JUSTICE SANFORD delivered the opinion of the Court.

This case depends upon the construction and effect of § 33 of the Merchant Marine Act of 1920,[1] which amended § 20 of the Seamen's Act of 1915 [2] so as to provide:

"That any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal repre-

[1] 41 Stat. 988, c. 250; U. S. C., Tit. 46, § 688.

[2] 38 Stat. 1164, c. 153.

sentative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. . . ."

By this Act, as heretofore construed by this Court, the prior maritime law of the United States was modified by giving to seamen injured through negligence the rights given to railway employees by the Federal Employers' Liability Act and its amendments, and permitting these new and substantive rights to be asserted and enforced in actions *in personam* against the employers in federal and state courts administering common law remedies, or in suits in admiralty in courts administering maritime remedies. *Panama R. R. Co.* v. *Johnson,* 264 U. S. 375; *Engel* v. *Davenport,* 271 U. S. 33; *Panama R. R.* v. *Vasquez,* 271 U. S. 557; *Baltimore S. S. Co.* v. *Phillips,* 274 U. S. 316; *Pacific S. S. Co.* v. *Peterson,* 278 U. S. 130.

The Federal Employers' Liability Act,[3] which was incorporated in the Merchant Marine Act by reference, related to the liability of common carriers by railroad to their employees in interstate and other commerce, as specified. Sec. 1 provided that every such carrier "shall be liable in damages" to any employee suffering injury, "or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment." By

[3] 35 Stat. 65, c. 149; U. S. C., Tit. 45, § 51.

this section, if the injury to the employee results in death his personal representative—while not given any right of action in behalf of the estate—is invested, solely as trustee for the designated survivors, with the right to recover for their benefit such damages as will compensate them for any pecuniary loss which they sustained by the death. See *St. Louis & Iron Mtn. Ry.* v. *Craft,* 237 U. S. 648, 656; *C. B. & Q. R. R.* v. *Wells-Dickey Co.,* 275 U. S. 161, 163. And if the employee leaves no survivors in any of the classes of beneficiaries alternatively designated, it necessarily follows that the personal representative can not maintain any action to recover damages for the death, since there is no beneficiary in whose behalf such an action can be brought.

In 1926, Barford, a seaman employed as third mate on a merchant vessel owned by the United States—then lying at the port of Norfolk, Virginia, in a floating drydock of Colonna's Shipyard, Inc., in which it was being reconditioned—while working in a lifeboat swinging on the vessel's davits, was thrown on the dock by the sudden release of one end of the lifeboat and instantly killed. Lindgren, the administrator of his estate, proceeding under the Suits in Admiralty Act,[4] filed a libel *in personam* against the United States in the Federal District Court for Eastern Virginia to recover damages for his death.[5] The libel declared specifically "in a cause of tort and death by wrongful act"; alleged that Barford's death was occasioned by negligence and wrongdoing on the part of the United States, its officers, servants, and employees in respect to the fastening of the lifeboat and various other matters; and averred that the libellant, as administrator of Bar-

[4] 41 Stat. 525, c. 95; U. S. C., Tit. 46, c. 20.

[5] The Shipyard was also impleaded as a co-defendant; but at the hearing in the District Court, pursuant to a concession made by counsel for the administrator, the libel was dismissed as against it. This is not here in question.

ford's estate, was entitled to recover, "for and on behalf of the decedent's dependents and heirs," damages for his death. It did not allege, however, that Barford left surviving him either a widow, child, or parent, or any next of kin dependent upon him; nor that his death was caused by unseaworthiness of the vessel.

The United States unsuccessfully excepted to the libel on the ground that it "failed to state a cause of action," and then answered on the merits, averring, *inter alia,* that in any event it would not be liable to damages in excess of the proved dependency of such dependents as Barford might have left surviving him.

At the hearing it was not shown that Barford left any survivor in any of the classes designated as beneficiaries by the Federal Employers' Liability Act; there being no evidence that his heirs, a nephew and niece, were dependent upon him.

The District Court found that Barford's death was caused by the negligent installation of the releasing gear in the lifeboat, which permitted it to fall and made this device unseaworthy; held that, although the administrator could not recover under the Merchant Marine Act, applying the rule under the Federal Employers' Liability Act, since the surviving nephew and niece were not dependent, he was entitled to recover under the Virginia Death Statute,[6] which provided that a personal representative might maintain a suit for damages on account of the death of a person caused by the wrongful act of another—under which dependency was not a necessary condition and the probable earnings of the decedent might be shown; and fixed the damages under this statute at $5,000, for which the administrator was given a decree against the United States.

On appeal the Circuit Court of Appeals held that the right of action given to the personal representative of a

[6] Code of Virginia, § 5786, *et seq.*

seaman by the Merchant Marine Act for personal injury resulting in death, was exclusive and superseded the Virginia Death Statute; and since, under the provisions of the Federal Employers' Liability Act incorporated in the Merchant Marine Act, there could be no recovery, reversed the decree of the District Court and dismissed the libel. 28 F. (2d) 725.

It is clear that, as Barford left no survivors designated as beneficiaries by the Federal Employers' Liability Act, the administrator was not entitled to maintain an action for the recovery of damages under the provisions of that Act, made applicable in case of the death of a seaman by § 33 of the Merchant Marine Act. But while this is not questioned by the administrator, he urges that the right of action given the personal representative by the Merchant Marine Act is not exclusive, and that it neither supersedes the right of action given him by the death statute of the State in which the injury was sustained, nor precludes his right to recover indemnity for the death under the old admiralty rules on the ground that the injuries were occasioned by the unseaworthiness of the vessel. These contentions can not be sustained.

1. Prior to the adoption of the Merchant Marine Act the general maritime law of the United States did not authorize any recovery of damages or indemnity for the death of a seaman, whether the injury was caused by the negligence of the owner or other members of the crew or the unseaworthiness of the vessel. See *The Harrisburg*, 119 U. S. 199; *The Osceola*, 189 U. S. 158, 175; *Western Fuel Co.* v. *Garcia*, 257 U. S. 233, 240. In this situation it was held, in the absence of any legislation by Congress, that where a seaman's death resulted from a maritime tort on navigable waters within a State whose statutes gave a right of action on account of death by wrongful act, the admiralty courts could entertain a libel *in personam* for the damages sustained by those to whom such right

was given. *Western Fuel Co.* v. *Garcia, supra,* 242; *Great Lakes Co.* v. *Kierejewski,* 261 U. S. 479, 480.[7] But, as said by the Circuit Court of Appeals, such statutes "were not a part of the general maritime law" and were recognized only because Congress had not legislated on the subject.

By the Merchant Marine Act, however, the prior maritime law was modified by giving to personal representatives of seamen whose death had resulted from personal injuries, the right to maintain an action for damages in accordance with the provisions of the Federal Employers' Liability Act. It is plain that the Merchant Marine Act is one of general application intended to bring about the uniformity in the exercise of admiralty jurisdiction required by the Constitution, and necessarily supersedes the application of the death statutes of the several States. This has been determined in two prior decisions of this Court. In *Panama Railroad Co.* v. *Johnson, supra,* 392—the pioneer case in which the constitutionality and effect of § 33 of the Merchant Marine Act were considered and dealt with at length—in answering the assertion that the Act departed from the constitutional requirement that it should be coextensive with and operate uniformly in the whole of the United States, the Court said: "The statute extends territorially as far as Congress can make it go, and there is nothing in it to cause its operation to be otherwise than uniform. The national legislation respecting injuries to railway employees engaged in interstate and foreign commerce which it adopts has a uniform operation, and neither is nor can be deflected therefrom by local statutes or local views of common law rules. *Second Employers' Liability Cases,* 223 U. S. 1, 51, 55; *Baltimore & Ohio R. R. Co.* v. *Baugh,* 149 U. S. 368, 378. Of course that legislation will have a like operation as part of this

[7] In each of these cases the death had occurred before the adoption of the Merchant Marine Act; in the *Garcia* case in 1916 (238); and in the *Kierejewski* case in 1919 (see 280 Fed. 125, 126).

statute." And recently we said in *Northern Coal Co.* v. *Strand,* 278 U. S. 142, 147: "We think it necessarily follows from former decisions that by the Merchant Marine Act—a measure of general application—Congress provided a method under which the widow of [a seaman] might secure damages resulting from his death, and that no state statute can provide any other or different one." To the same effect is *Patrone* v. *Howlett,* 237 N. Y. 394, 397, in which the court said that the administrators of a seaman killed in the course of his employment, "did not have a remedy under the state act after the [Merchant Marine] Act occupied the field and became a part of the general maritime law."

These decisions are in accordance with the long settled rule that since Congress by the Federal Employers' Liability Act took possession of the field of the employers' liability to employees in interstate transportation by rail, all state laws on the subject are superseded. *Second Employers' Liability Cases, supra,* 54; *Seaboard Air Line* v. *Horton,* 233 U. S. 492, 501; *New York Central R. R. Co.* v. *Winfield,* 244 U. S. 147, 149; *Erie R. R. Co.* v. *Winfield,* 244 U. S. 170, 172; and cases cited. In the *Second Employers' Liability Cases, supra,* 54, this Court said: "True, prior to the present act the laws of the several States were regarded as determinative of the liability of employers engaged in interstate commerce for injuries received by their employés while engaged in such commerce. But that was because Congress, although empowered to regulate that subject, had not acted thereon, and because the subject is one which falls within the police power of the States in the absence of action by Congress. *Sherlock* v. *Alling,* 93 U. S. 99; *Smith* v. *Alabama,* 124 U. S. 465, 473, 480, 482; *Nashville, &c. Railway* v. *Alabama,* 128 U. S. 96, 99; *Reid* v. *Colorado,* 187 U. S. 137, 146. The inaction of Congress, however, in no wise affected its power over

the subject. *The Lottawanna,* 21 Wall. 558, 581; *Gloucester Ferry Co.* v. *Pennsylvania,* 114 U. S. 196, 215. And now that Congress has acted, the laws of the States, in so far as they cover the same field, are superseded, for necessarily that which is not supreme must yield to that which is. *Gulf, Colorado and Santa Fe Railway Co.* v. *Hefley,* 158 U. S. 98, 104; *Southern Railway Co.* v. *Reid,* 222 U. S. 424; *Northern Pacific Railway Co.* v. *Washington,* 222 U. S. 370."

In *New York Central R. R. Co.* v. *Winfield, supra,* 150, 153, the Court furthermore held that although the Federal Employers' Liability Act "does not require the carrier to respond for injuries occurring where it is not chargeable with negligence," this is "because Congress, in its discretion, acted upon the principle that compensation should be exacted from the carrier where, and only where, the injury results from negligence imputable to it"; that the Act "is as comprehensive of injuries occurring without negligence, as to which class it impliedly excludes liability, as it is of those as to which it imposes liability" and "is a regulation of the carriers' duty or obligation as to both"; and that "the reasons which operate to prevent the States from dispensing with compensation where the act requires it equally prevent them from requiring compensation where the act withholds or excludes it." This was followed and approved in *Erie R. R. Co.* v. *Winfield, supra,* 172, in which the Court said that the Act "establishes a rule or regulation which is intended to operate uniformly in all the States, as respects interstate commerce, and in that field it is both paramount and exclusive."

In the light of the foregoing decisions and in accordance with the principles therein announced we conclude that the Merchant Marine Act—adopted by Congress in the exercise of its paramount authority in reference to the maritime law and incorporating in that law the provisions of the Federal Employers' Liability Act—establishes as

a modification of the prior maritime law a rule of general application in reference to the liability of the owners of vessels for injuries to seamen extending territorially as far as Congress can make it go; that this operates uniformly within all of the States and is as comprehensive of those instances in which by reference to the Federal Employers' Liability Act it excludes liability, as of those in which liability is imposed; and that, as it covers the entire field of liability for injuries to seamen, it is paramount and exclusive, and supersedes the operation of all state statutes dealing with that subject.

It results that in the present case no resort can be had to the Virginia Death Statute, either to create a right of action not given by the Merchant Marine Act, or to establish a measure of damages not provided by that Act.

2. Nor can the libel be sustained as one to recover indemnity for Barford's death under the old maritime rules on the ground that the injuries were occasioned by the unseaworthiness of the vessel. Aside from the fact that the libel does not allege the unseaworthiness of the vessel and is based upon negligence alone, an insuperable objection to this suggestion is that the prior maritime law, as herein above stated, gave no right to recover indemnity for the death of a seaman, although occasioned by unseaworthiness of the vessel. The statement in *The Osceola, supra,* 175, on which the administrator relies, relates only to the seaman's own right to recover for personal injuries occasioned by unseaworthiness of the vessel, and confers no right whatever upon his personal representatives to recover indemnity for his death. Apparently for this reason the words "at his election,"—which appear in the first clause of § 33 of the Merchant Marine Act, relating to the personal right of action of an injured seaman, and, as held in *Pacific Co.* v. *Peterson, supra,* 139, gave him, as alternative measures of relief, "an election between the right under the new rule to recover compensatory damages for injuries caused by negligence, and

the right under the old rules to recover indemnity for injuries occasioned by unseaworthiness"—were omitted from the second clause of § 33 of the Merchant Marine Act, relating to the right of the personal representative to recover damages for the seaman's death, since there was no right to indemnity under the prior maritime law which he might have elected to pursue. And, for the reasons already stated, and in the absence of any right of election, the right of action given the personal representative by the second clause of § 33 to recover damages for the seaman's death when caused by negligence, for and on behalf of designated beneficiaries, is necessarily exclusive and precludes the right of recovery of indemnity for his death by reason of unseaworthiness of the vessel, irrespective of negligence, which cannot be eked out by resort to the death statute of the State in which the injury was received.

3. It is suggested in argument that if the statutes of the several States are superseded by the Merchant Marine Act it would follow that the Death on the High Seas Act,[8] which had been previously adopted, would likewise be superseded. That Act, however, concededly has no application here, since Barford's death did not occur on the high seas but within the territorial limits of the State of Virginia. We have no occasion to consider its scope and effect here and do not determine what effect, if any, the Merchant Marine Act has upon it; and nothing stated in this opinion is to be considered as having any reference to those questions. Nor do we consider or determine the effect of the Federal Employees Compensation Act,[9] upon which, although incidentally referred to in argument, neither the administrator nor the United States here relies.

The decree is

Affirmed.

[8] 41 Stat. 537, c. 111, U. S. C., Tit. 46, c. 21.

[9] 39 Stat. 742, c. 458, U. S. C., Tit. 5, c. 15.

DISTRICT OF COLUMBIA *v.* FRED.

CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 229. Argued January 24, 1930.—Decided February 24, 1930.

The Traffic Act for the District of Columbia, in extending, § 8(a), the privilege of operating motor cars within the District without having District operators' permits to non-residents licensed to operate such vehicles in States granting like exemptions to residents of the District, does not relieve a non-resident, so licensed, who formerly resided in the District and whose District permit was then revoked under § 13(a), from punishment under § 13(d), if he operates his vehicle within the District during the unexpired period of the revoked permit. P. 51.

33 F. (2d) 375, reversed.

CERTIORARI, 280 U. S. 541, to review a judgment of the Court of Appeals of the District of Columbia which, on writ of error, reversed a judgment of the Police Court sentencing the respondent for a violation of the Traffic Act.

Mr. Richmond B. Keech, Assistant Corporation Counsel, District of Columbia, with whom *Messrs. William W. Bride,* Corporation Counsel, and *Edward W. Thomas,* Assistant Corporation Counsel, were on the brief, for petitioner.

Mr. S. McComas Hawken for respondent.

MR. JUSTICE STONE delivered the opinion of the Court.

Respondent was convicted in the police court of the District of Columbia of the offense of operating a motor vehicle in the District during the unexpired period of his operator's permit after it had been revoked. § 13 (d) of the Traffic Acts of the District of Columbia, Act of March

3, 1925, as amended by Act of July 3, 1926. C. 443, 43 Stat. 1119; c. 739, 44 Stat., Pt. 2, 812. The Court of Appeals of the District, on writ of error, set aside the conviction. 33 F. (2d) 375. This Court granted certiorari May 27, 1929, to review its judgment.

Section 13 (d) provides: "Any individual found guilty of operating a motor vehicle in the District during the period for which his operator's permit is revoked or suspended, or for which his right to operate is suspended under this Act, shall, for each such offense, be fined not less than $100 nor more than $500, or imprisoned not less than thirty days nor more than one year, or both." The facts, proved at the trial, showed an unquestioned violation of this section by respondent unless, as contended, his possession of a Virginia operator's permit or license, aided by the reciprocity provisions of the District Traffic Acts, exempts him from its operation.

Following the revocation of his District of Columbia permit, respondent, who was then a resident of the District, took up his residence in Virginia and procured from that state a motor vehicle registration card and automobile license tags, authorizing him to operate his motor car in Virginia. The alleged violation of § 13 (d) occurred while his Virginia registration license was in force and while respondent was temporarily in the District, driving his automobile equipped with the Virginia license tags.

By § 7, all persons operating motor cars within the District are required to have an operator's permit, which permit, under § 13 (a), may be suspended or revoked by the Director of Traffic for cause. By § 7 (e) operation of a motor vehicle without a permit is punishable by fine of "not more than $500 or imprisonment for not more than six months, or both." But by § 8 (a) the requirement of an operator's permit is dispensed with in favor of non-residents who have procured a permit or license

from a state granting like exemptions to residents of the District, as has the State of Virginia. The language of the exemption is: "shall be exempt from compliance with § 7 and with provisions of law or regulations requiring the registration of motor vehicles or the display of identification tags in the District."

The court below, in setting aside the conviction, rested its decision on the ground that this provision "expressly relieves the non-resident owner or operator of a motor vehicle, who has complied with the laws of his state respecting registration and operators' licenses, from either registering his vehicle here or obtaining a local operator's permit, provided only that similar privileges are extended to residents of the District in that state." But respondent was not charged with violation of § 7, which forbids operating without a license, or of any provision or regulation requiring the registration of motor vehicles, which are the only offenses exempted under § 8. He was charged with a different offense, under § 13 (d),—that of operating a vehicle within a specified time after the revocation of his permit, for which a different penalty is provided than for violations of § 7. It is significant that the exemption clause in § 8 (a) specifically refers to § 7 but makes no mention of § 13 (d).

If the clause were ambiguous or there were any room for construing it, examination of the whole Act makes evident its general purpose not to extend to non-residents any reciprocal privilege beyond relieving them from the necessity of procuring a District operator's license and complying with provisions for the registration of their vehicles, and that all other requirements of the Act and penalties for non-compliance were left in full force and effect. By § 13 (c) the right to operate a car in the District under the license or permit of a state may be suspended; and operation of the car in the District during the period of suspension is punishable under § 13 (d).

It cannot be supposed that any distinction was intended to be drawn between the consequences of operating a car within the District by one whose right to operate under a foreign license had been suspended and one whose right to operate under a District license had been revoked or suspended. We can find nothing in the sections cited or the Traffic Acts as a whole to suggest that there is.

Reversed.

COLLIE ET AL. *v.* FERGUSSON ET AL.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

No. 423. Argued January 13, 1930.—Decided February 24, 1930.

1. Rev. Stats., § 4529, providing that the owner of any vessel making coastwise voyages who refuses or neglects to pay a seaman's wages in the manner therein prescribed "without sufficient cause," shall pay the seaman a sum equal to two days' pay for each day during which payment is delayed, does not apply where delay in payment is due to the insolvency of the owner and the arrest of the vessel subject to accrued claims beyond its value. P. 54.
2. Evidence in an admiralty suit *not reviewed* when sufficient to support the concurrent action of two courts below. P. 57.
3. Seamen who appealed unsuccessfully to the Circuit Court of Appeals from a decree in admiralty properly denying their claims to payment of double wages for waiting time from the proceeds of a vessel, *held* entitled to two-thirds of the costs in that court because payment of wages from such proceeds, adjudged in their favor, was withheld through a suspension of the decree pending the appeal, ordered by the District Court at the instance of their opponents, who took no cross appeal. P. 57.

31 F. (2d) 1010, modified and affirmed.

CERTIORARI, 280 U. S. 547, to review a decree of the Circuit Court of Appeals affirming a decree in admiralty.

Mr. Jacob L. Morewitz, with whom *Mr. Percy Carmel* was on the brief, for petitioners.

Messrs. Leon T. Seawell and *Henry Bowden,* with whom *Messrs. D. Arthur Kelsey, R. Arthur Jett, Walter Sibert* and *Samuel E. Forwood* were on the brief, submitted for respondents.

MR. JUSTICE STONE delivered the opinion of the Court.

This case is here on writ of certiorari, granted October 28, 1929, to review a decree of the Court of Appeals for the Fourth Circuit, which affirmed, without opinion, a decree of the District Court of Eastern Virginia, denying, also without opinion, the claims of petitioners, who are seamen, for double wages for "waiting time," under R. S. § 4529; Tit. 46, U. S. Code, § 596; (Act of July 20, 1790, c. 29, § 6, 1 Stat. 133; Act June 7, 1872, c. 322, § 35, 17 Stat. 269, as amended, Act December 31, 1898, c. 28, § 26, 30 Stat. 764; Act March 4, 1915, c. 153, § 3, 38 Stat. 1164).

The power boat "Dola Lawson," licensed for coastwise trade, and Fergusson, her owner, were libelled for repairs and materials supplied to the vessel. Intervening petitions were filed, setting up claims for wages and the statutory allowance for waiting time in the case of the present petitioners, and for repairs, materials and supplies in the case of other libellants. The vessel was sold by order of the court, and the proceeds, which are insufficient to satisfy the claims allowed, were paid into the registry of the court to the credit of the cause.

The employment of two of the petitioners was terminated by the seizure of the vessel. That of the third, Rowe, was terminated by mutual consent some six months before the seizure. There was evidence from which the trial court might have concluded that he consented to deferred payment of his wages because of the financial necessities of the owner. It was admitted on the argument that the owner, because of his insolvency, was unable to pay seamen's wages and that petitioners must look alone to the proceeds of the vessel for the satisfaction of their

claims,—admissions which find support in the confused, and in many respects unsatisfactory, record.

The District Court denied petitioners' claims for double wages for waiting time, but decreed payment of the wages due, with interest, as prior liens. Although the other lienors did not appeal, the court, at their instance, but for reasons which do not appear, suspended the decree pending the appeal, so that the wages allowed could not be paid from the proceeds of the vessel. To the amounts found due the petitioners, the Court of Appeals added interest until payment.

Section 4529, so far as relevant, provides: "The master or owner of any vessel making coastwise voyages shall pay to every seaman his wages within two days after the termination of the agreement under which he was shipped, or at the time such seaman is discharged, whichever first happens. . . . Every master or owner who refuses or neglects to make payment in the manner hereinbefore mentioned, without sufficient cause, shall pay to the seaman a sum equal to two days' pay for each and every day during which payment is delayed . . ., which sum shall be recoverable as wages in any claim made before the Court . . ."

The claim for double wages which, when valid, is by the terms of the statute "recoverable as wages," has been held to be embraced in the seaman's lien for wages with priority over other liens, and governed by the procedure applicable to suits for the recovery of seamen's wages. *The Trader,* 17 F. (2d) 623; *Gerber* v. *Spencer,* 278 Fed. 886; *The Nika,* 287 Fed. 717; *The Great Canton,* 299 Fed. 953; *The Fort Gaines,* 18 F. (2d) 413; *The St. Paul,* 77 Fed. 998; *Buckley* v. *Oceanic S. S. Co.,* 5 F. (2d) 545; *The Charles L. Baylis,* 25 Fed. 862; *The British Brig Wexford,* 3 Fed. 577; *Cox* v. *Lykes Brothers,* 237 N. Y. 376; cf. *The Morning Star,* 1 F. (2d) 410, 411.

With these rulings as a premise, petitioners argue that the statutory allowance is compensatory; that it accrues upon mere delay in payment of wages, and may be recovered by including it in petitioners' liens for wages, which have priority over the liens of materialmen, notwithstanding the general rule that events subsequent to the seizure do not give rise to liens against a vessel *in custodia legis*. See *The Young America*, 30 Fed. 789, 790; *The Nisseqoque*, 280 Fed. 174, 181; *The Grapeshot*, 22 Fed. 123. Cf. *New York Dock Co.* v. *The Poznan*, 274 U. S. 117.

But the increased payment for waiting time is not denominated wages by the statute, and the direction that it shall be recovered as wages does not purport to affect the condition prerequisite to its accrual, that refusal or neglect to pay shall be without sufficient cause. The phrase "without sufficient cause" must be taken to embrace something more than valid defenses to the claim for wages. Otherwise, it would have added nothing to the statute. In determining what other causes are sufficient, the phrase is to be interpreted in the light of the evident purpose of the section to secure prompt payment of seamen's wages (H. R. Rep. 1657, Committee on the Merchant Marine and Fisheries, 55th Cong., 2nd Sess.) and thus to protect them from the harsh consequences of arbitrary and unscrupulous action of their employers, to which, as a class, they are peculiarly exposed.

The words "refuses or neglect to make payment . . . without sufficient cause" connote, either conduct which is in some sense arbitrary or wilful, or at least a failure not attributable to impossibility of payment. We think the use of this language indicates a purpose to protect seamen from delayed payments of wages by the imposition of a liability which is not exclusively compensatory,

but designed to prevent, by its coercive effect, arbitrary refusals to pay wages, and to induce prompt payment when payment is possible. Hence we conclude that the liability is not imposed regardless of the fault of the master or owner, or his retention of any interest in the vessel from which payment could be made. It can afford no such protection and exert no effective coercive force where delay in payment, as here, is due to the insolvency of the owner and the arrest of the vessel, subject to accrued claims beyond its value. Together these obstacles to payment of wages must be taken to be a sufficient cause to relieve from the statutory liability. *The Trader, supra; Feldman* v. *American Palestine Line, Inc., supra.* Cf. *Gerber* v. *Spencer, supra.* Otherwise, it would not be imposed on the owner directly or through his interest in the ship, but only upon the lienors, who are neither within the letter nor the spirit of the statute.

That the liability is not incurred where the refusal to pay is in some reasonable degree morally justified, or where the demand for wages cannot be satisfied either by the owner or his interest in the ship, has been the conclusion reached with practical unanimity by the lower federal courts. *The Wenonah,* Fed. Cas. No. 17, 412; *The General McPherson,* 100 Fed. 860; *The Alice B. Phillips,* 106 Fed. 956; *The George W. Wells,* 118 Fed. 761; *The Express,* 129 Fed. 655; *The St. Paul, supra; The Sadie C. Sumner,* 142 Fed. 611; *The Amazon,* 144 Fed. 153; *The Sentinel,* 152 Fed. 564; *Pacific Mail S. S. Co.* v. *Schmidt,* 214 Fed. 513, 520; *The Moshulu,* 276 Fed. 35; *The Acropolis,* 8 F. (2d) 110; *Villigas* v. *United States,* 8 F. (2d) 300; *The Trader, supra; Feldman* v. *American Palestine Line, Inc., supra;* cf. *The City of Montgomery,* 210 Fed. 673, 675; *Burns* v. *Fred L. Davis Co.,* 271 Fed. 439; *Gerber* v. *Spencer, supra; The Lake Galewood,* 21 F. (2d) 987.

The evidence affecting the claim of Rowe is not reviewed, since, as already indicated, there is evidence which, in the light of the statute as now interpreted, supports the concurrent action of the two courts below.

It is unnecessary to pass upon the contention, apparently first made here, that § 4529 does not apply to fishing vessels (see Notes to § 596, Tit. 46, U. S. C. A.), and that the "Dola Lawson," although licensed for the coastwise trade, must be deemed excluded from the operation of the Act because of her use as a fishing vessel.

In view of the unwarranted retention of the amount awarded to petitioners, as wages, by that part of the decree of the District Court from which no appeal was taken, the costs in the Court of Appeals will be divided, two-thirds to appellants and one-third to appellees, and the decree below as so modified will be

Affirmed.

ILLINOIS CENTRAL RAILROAD COMPANY *v.* CRAIL, DOING BUSINESS AS P. McCOY FUEL COMPANY.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. 75. Argued January 10, 1930.—Decided February 24, 1930.

1. Under the Cummins Amendment and the common law of compensatory damages, the amount which a coal dealer is entitled to recover from a rail carrier for failure to make delivery of part of a car-load shipment of coal, is the full actual loss at point of destination. P. 63.
2. Where the shortage was capable of replacement and was, in fact, replaced in the course of the dealer's business from purchases made in car-load lots at wholesale market price without added expense, the recovery is measured by the wholesale price, including any profit over cost at the mine plus freight, and not by the retail market price, which includes costs of delivery to retail customers

not incurred by the dealer and a retail profit not earned by him by any contract of re-sale. Pp. 63–65.

31 F. (2d) 111, reversed.

CERTIORARI, 279 U. S. 833, to review a judgment of the Circuit Court of Appeals which affirmed a judgment of the District Court, 21 F. (2d) 831, against the Railroad Company in an action for non-delivery of coal. See also 2 F. (2d) 287; 13 *id.* 459.

Mr. Edward C. Craig, with whom *Messrs. Edwin C. Brown* and *R. V. Fletcher* were on the brief, for petitioner.

If respondent be paid the market value of the coal in car at destination he will be compensated for loss of what he would have had if contract of shipment had been performed. *Chicago, M. & St. P. R. Co.* v. *McCaull-Dinsmore Co.,* 253 U. S. 97; *Hicks* v. *Guinness,* 269 U. S. 71; *Southern Pacific Co.* v. *Darnell-Taenzer Co.,* 245 U. S. 531; *United States* v. *New River Collieries,* 262 U. S. 341, at pp. 343, 344.

The respondent did not buy this coal separate and apart from its being a part of the carload of coal. He did not buy any particular quantity. He bought a carload of coal which happened to contain so much coal.

The measure of damages is the difference between the market value of a car of coal delivered in accordance with the contract and the market value of the car as it was in fact delivered. *Barry* v. *Los Angeles & S. L. R. Co.,* 56 Utah 69.

In cases of damage to a carload of, for example, perishables, where the carrier's breach consists of failure to transport the shipment safely, the measure of damages and rule of computation are generally stated by the courts to be the difference between the fair, reasonable destination value of the carload in the condition in which it should have been delivered, i. e., undamaged, and the fair,

reasonable destination value of the carload in the condition in which it was delivered. In such cases plaintiff's "full actual loss, damage or injury" is invariably and properly computed by taking the difference between carload values, as such. *Gulf, C. & S. F. Ry. Co.* v. *Texas Packing Co.*, 244 U. S. 31, 37; *New York, L. E. & W. R. Co.* v. *Estill*, 147 U. S. 591, 616–7; *Peterson* v. *Case*, 21 Fed. 885, 891.

The fundamental thing in all breach of contract cases is not that plaintiff be paid the value of what is not delivered or lost, but that he be made whole. The primary thing is compensation to him for his loss; the secondary thing is the value of what was lost. The latter is only one method of arriving at the former.

Respondent if allowed to recover more than the market value of the coal in the car will be more than compensated for the loss suffered.

This case is but a case of a breach of contract and the damages are those which will compensate for the "full actual loss, damage or injury to such property." *Globe Refining Co.* v. *Landa Cotton Oil Co.*, 190 U. S. 540; *Wehle* v. *Haviland*, 69 N. Y. 448, 451.

See the cases cited in the dissenting opinion below and in the case of *Brown Coal Co.* v. *Illinois Cent. R. Co.*, 196 Iowa 562.

Mr. Stanley B. Houck, with whom *Mr. W. Yale Smiley* was on the brief, for respondents.

The measure of damages for the loss in transit of a part of a shipment is the value of what has been lost at the time and place at which it should have been delivered, with interest, less the transportation charges, if they have not been paid. *Chicago, M. & St. P. Ry. Co.* v. *McCaull-Dinsmore Co.*, 253 U. S. 97; *Leominster Fuel Co.* v. *New York, N. H. & H. R. Co.*, 258 Mass. 149; *Crutchfield & Woolfolk* v. *Hines*, 239 Mass. 84; *Woonsocket M. & P.*

Co. v. *New York, N. H. & H. R. Co.*, 239 Mass. 211; *Hoover & Co.* v. *Denver & R. G. W. R. Co.*, 17 F. (2d) 881; *Allen* v. *Adams Express Co.*, 77 Pa. Super. Ct. 174; *Atlantic Coast Line Ry. Co.* v. *Roe* (Fla.), 118 So. 155.

If the commodity lost in transit be a staple which, like coal, is produced for sale and consumption, not for retention and long use, the only inquiry to be made in reckoning its value is its worth as an article of sale. If it be shown that at the destination, at the time the remainder of the shipment arrived there, there was a market in which like coal in like volume was openly bought and sold, the price current in such market will be regarded as its fair market value and likewise the measure of just compensation for its loss. *Cliquot's Champagne*, 3 Wall. 114, 125, 142; *Muser* v. *Magone*, 155 U. S. 240, 249; *Murray* v. *Stanton*, 99 Mass. 348; *Stanford* v. *Peck*, 63 Conn. 486, 493; *United States* v. *New River Collieries Co.*, 262 U. S. 341.

The market value at destination of the quantity of coal lost is the amount it would have been necessary for the shipper to pay in the open market, at the time and place of delivery, for such a quantity and kind of coal as the carrier failed to deliver as agreed. *Wendnagel* v. *Houston*, 155 Ill. App. 664; *United States* v. *New River Collieries Co., supra.*

There can be no quibble about the statutory liability being for the full, actual loss, damage or injury. Neither can there be any real doubt that where the property lost has a readily ascertainable market value at the proper time and place, that value is the measure of full, actual loss, damage, or injury. Such is the holding of this court in *United States* v. *New River Collieries Co., supra.* In that case also, this court answers petitioner's argument about the justness of a recovery at $13.00 per ton by holding that "the lower courts rightly held that market

prices prevailing at the times and place of the taking constitute just compensation."

Where the law has established a rule for measuring damage for breach of contract, such as loss in transit by a carrier, the parties are conclusively presumed to contemplate a measurement of such a loss by that rule. 1 *Sedgwick on Damages* (9th ed.) § 40, p. 45; 1 *Sutherland on Damages* (4th ed.), § 105, p. 367; *Brown* v. *Chicago, M. & St. P. Ry. Co.*, 54 Wis. 342.

In determining the value of the commodity which has been lost, the inquiry is limited to the time when the shipment from which the loss occurred was delivered at destination. It is improper to inquire into later events such as whether plaintiff in error was under any necessity of making replacement, or did in fact replace, or that he was a coal dealer, making purchases in carload lots from time to time as his necessity required, which purchases included coal of the kind and quality here in question, of which, on the arrival of the carload from which the loss occurred, he had sufficient for his needs until the arrival of the next carload of the same kind which should be purchased, etc., *Stone* v. *Codman*, 15 Pick. (Mass.) 297, 300; *Olds* v. *Mapes-Reeve Construction Co.*, 177 Mass. 41, 44; *Southern Pac. Co.* v. *Darnell-Taenzer Co.*, 245 U. S. 531, 534.

The simple market value, not its component parts nor the sources from which it is derived nor its other concomitants, shall measure such damages. *The Rossend Castle*, 30 Fed. 462; *The Erroe*, 17 Blatchf. (C. C.) 16, Fed. Cas. 4522; *Moelring* v. *Smith*, 7 Ind. App. 451; *Waggoner Undertaking Co.* v. *Jones* (Mo.), 114 S. W. 1049.

Messrs. Frederic D. McKenney, W. F. West, S. R. Prince, A. W. Blackman, F. M. Rivinus, Charles E. Miller,

M. K. Rothschild, W. E. Kay, F. G. Dorety, George A. Kingsley, C. W. Wright, E. E. McInnes and *Joseph M. Bryson,* by special leave of Court, filed a statement and suggestions in support of the petition for certiorari, on behalf of certain railroad companies, as *amici curiae.*

Mr. Justice Stone delivered the opinion of the Court.

In this case certiorari was granted May 27, 1929, to review a ruling of the Court of Appeals for the Eighth Circuit upon the measure of damages recoverable in a suit brought under the Cummins Amendment of March 4, 1915, 38 Stat. 1197, as amended 41 Stat. 494 [49 U. S. C., § 20(11),] against a rail carrier for failure to deliver a part of an interstate shipment of coal.

Respondent, plaintiff below, a coal dealer in Minneapolis, purchased, while in transit, a carload of coal weighing at shipment 88,700 pounds. On delivery at destination, the respondent's industrial siding, there was a shortage of 5,500 pounds. At the time of arrival, respondent had not resold any of the coal. It was intended to be, and was, added to his stock of coal for resale, but the shortage did not interfere with the maintenance of his usual stock. He lost no sales by reason of it, and purchased no coal to replace the shortage, except in carload lots. In the course of his business, respondent could and did, both before and after the present shipment, purchase coal of like quality in carload lots of 60,000 pounds or more, delivered at his siding, at $5.50 per ton, plus freight. The market price in Minneapolis for like coal sold at retail in less than carload lots was $13.00 per ton, including $3.30 freight.

The case was twice tried. On the first trial, the District Court gave judgment for the wholesale value of the coal not delivered. 2 F. (2d) 287. The Court of Appeals reversed the judgment, holding that it should have been for the retail value of the coal. 13 F. (2d) 459. Upon

retrial, the District Court gave judgment accordingly, 21 F. (2d) 831, which was affirmed below. 31 F. (2d) 111.

By the Cummins Amendment the holder of a bill of lading issued for an interstate rail shipment is entitled to recover for failure to make delivery of any part of the shipment without legal excuse, "the full actual loss, damage or injury to such property" at point of destination. *Chicago, M. & St. P. Ry. Co.* v. *McCaull-Dinsmore Co.*, 253 U. S. 97.

It is not denied that a recovery measured by the wholesale market price of the coal would fully compensate the respondent, or that the retail price, taken as the measure of the recovery allowed below, includes costs of delivery to retail consumers which respondent did not incur, and a retail profit which he had not earned by any contract of resale. But respondent contends, as was held below, that the established measure of damage for non-delivery of a shipment of merchandise is the sum required to replace the exact amount of the shortage at the stipulated time and place of delivery, which, in this case, would be its retail value, and that convenience and the necessity for a uniform rule require its application here.

This contention ignores the basic principle underlying common law remedies that they shall afford only compensation for the injury suffered, *Milwaukee & St. Paul R. Co.* v. *Arms*, 91 U. S. 489, 492; *Chicago, M. & St. P. Ry. Co.* v. *McCaull-Dinsmore Co., supra,* 100; *Robinson* v. *Harman,* 1 Exch. 850, 855; Sedgwick, Damages (9th Ed.), 25; Sutherland, Damages (4th Ed.,) § 12; Williston on Contracts, § 1338, and leaves out of account the language of the amendment, which likewise gives only a right of recovery for "actual loss." The rule urged by respondents was applied below in literal accordance with its conventional statement. As so stated, when applied to cases as they usually arise, it is a convenient and accurate method of arriving at an amount of recovery which is

compensatory. As so stated, it would have been applicable here if there had been a failure to deliver the entire carload of coal, since the wholesale price, at which a full carload could have been procured at point of destination, would have afforded full compensation, *Chicago, M. & St. P. Ry. Co.* v. *McCaull-Dinsmore Co., supra; Central of Georgia Ry. Co.* v. *American Coal Co.*, 28 Ga. App. 95; *Wendnagel* v. *Houston*, 155 Ill. App. 664; *Lake Erie, etc. R. R. Co.* v. *Frantz*, 85 Ind. App. 569; *Cutting* v. *Grand Trunk Ry.*, 13 Allen 381; *Crutchfield & Woolfolk* v. *Director General of R. R.*, 239 Mass. 84; *Smith* v. *N. Y. O. & Western Ry. Co.*, 119 Misc. Rep. (N. Y.) 506; *Yazoo & M. V. R. Co.* v. *Delta Grocer Co.*, 134 Miss. 846; *Chicago, R. I. & Pac. Ry. Co.* v. *Broe*, 16 Okla. 25; *Roth Coal Co.* v. *Louisville & Nashville R. R.*, 142 Tenn. 52; *Quanah A. & P. Co.* v. *Novitt*, 199 S. W. 496 (Tex. Civ. App.), or, in some circumstances, if respondent had been under any constraint to purchase less than a carload lot to repair his loss or carry on his business, for in that event the measure of his loss would have been the retail market cost of the necessary replacement. *Haskell* v. *Hunter*, 23 Mich. 305, 309. But in the actual circumstances the cost of replacing the exact shortage at retail price was not the measure of the loss, since it was capable of replacement and was, in fact, replaced in the course of respondent's business from purchases made in carload lots at wholesale market price without added expense.

There is no greater inconvenience in the application of the one standard of value than the other and we perceive no advantage to be gained from an adherence to a rigid uniformity, which would justify sacrificing the reason of the rule, to its letter. The test of market value is at best but a convenient means of getting at the loss suffered. It may be discarded and other more accurate means resorted to if, for special reasons, it is not exact or otherwise

not applicable. See *Wilmoth* v. *Hamilton*, 127 Fed. 48, 51; *Theiss* v. *Weiss*, 166 Pa. St. 9, 19; *Pittsburg Sheet Mfg. Co.* v. *West Penn Sheet Steel Co.*, 201 Pa. St. 150; Williston on Contracts, §§ 1384, 1385. In the absence of special circumstances, the damage for shortage in delivery by the seller of fungible goods sold by quantity is measured by the bulk price rather than the price for smaller quantities, both at common law, see *Morgan* v. *Gath*, 3 H. & C. 748; *Avery* v. *Wilson*, 81 N. Y. 341, and under § 44 of the Uniform Sales Act. Likewise, we think that the wholesale market price is to be preferred as a test over the retail when in circumstances like the present, it is clearly the more accurate measure, *Brown Coal Co.* v. *Illinois Central R. R. Co.*, 196 Iowa 562; see *State* v. *Smith*, 31 Mo. 566; *Wendnagel* v. *Houston, supra*, 666, 667; *Wood Co.* v. *Chicago, Milwaukee & St. Paul Ry. Co.*, 320 Ill. 341. Compare *Heidritter Lumber Co.* v. *Central R. R. of N. J.*, 100 N. J. Law, 402, *Leominster Fuel Co.* v. *New York, N. H. & H. Ry. Co.*, 258 Mass. 149, cited as supporting the conclusion of the court below In these cases it does not clearly appear whether the consignee suffered special damage by reason of the shortage, measured by the retail price, or whether he did or could replace it at the wholesale price in the ordinary course of business.

The court below thought that the fact that the award to respondent of the expense and profit, included in the retail price to consumers, did not militate against the rule it applied, for the reason that the wholesale price, as is often the case where market price is the measure of loss, likewise included a profit over mine cost plus freight. But respondent had done every act and incurred every expense prerequisite to procuring delivery at destination. Any profit included in its market value at the stipulated time and place of arrival was, therefore, appropriately included in the measure of his loss. In this respect it is

distinguishable from the expense and prospective profit not actually incurred or earned by respondent, represented by the retail price. See *Central of Georgia R. R. Co.* v. *American Coal Co., supra; Yazoo & M. V. R. Co.* v. *Delta Grocer Co., supra,* 146. Compare *Cincinnati, N. O. & T. P. Ry. Co.* v. *Hansford,* 125 Ky. 37; *Smith* v. *N. Y. O. & Western Ry. Co., supra; Quanah A. & P. Co.* v. *Novitt, supra.*

Reversed.

CARLEY & HAMILTON, INC., ET AL. *v.* SNOOK, CHIEF OF THE DIVISION OF MOTOR VEHICLES, STATE OF CALIFORNIA.

COTTINGHAM ET AL. *v.* SAME.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

Nos. 86 and 267. Submitted January 9, 1930.—Decided February 24, 1930.

1. Fees exacted by the California Motor Vehicle Act for the registration of specified classes of motor vehicles used for intrastate transportation of passengers for hire and of property, the revenue from which fees is applied by the Act to the support of the State Division of Motor Vehicles and to the construction and maintenance of public roads, *held* exactions made in the exercise of the state taxing power for the privilege of operating such vehicles over public highways, expended for state purposes, and not in conflict with the due process clause of the Fourteenth Amendment. P. 71.
2. There is nothing in the Federal Constitution which requires a State to apply such fees for the benefit of those who pay them. P. 72.
3. The proposition that, although the fees are not *per se* disproportionate to the privilege of operating over all the highways of the State, owners are entitled to licenses limiting the operation of their motor vehicles to a few highways which they wish to use (e. g. to streets in particular cities) upon payment of correspondingly reduced fees, is not supported by any constitutional principle. P. 72.

4. Owners of motor vehicles operated wholly or principally within the limits of California cities may not escape payment of the registration fees exacted by the Motor Vehicle Act upon the ground that they already pay the fees imposed by the cities, since the imposition of two taxes by different state statutes upon the same subject matter does not transgress the due process clause if the imposition of the total tax by a single statute would not do so. P. 72.
5. The California Motor Vehicle Act, in imposing graduated registration fees on described classes of motor vehicles used for the transportation of passengers for hire or of property, exempts vehicles weighing, when unladen, less than 3,000 lbs. *Held* not violative of the equal protection clause of the Fourteenth Amendment or of the similar provision of § 21, Art. I, of the California Constitution. P. 72.
6. The legislature may graduate such fees according to the propensities of the vehicles to injure the public highways, and may exempt those with respect to which it finds this tendency to be slight or non-existent. P. 73.
7. These registration fees are not "tolls" within the meaning of § 9 of the Federal Highway Act, providing "that all highways constructed or reconstructed under the provisions of this Act shall be free from tolls of all kinds." P. 73.

Affirmed.

APPEALS from decrees of the District Court of three judges dissolving temporary injunctions and dismissing the bills in two suits against California officials, to enjoin them from enforcing provisions of the state Motor Vehicle Act with respect to the imposition and collection of certain registration fees for motor vehicles.

Messrs. W. R. Crawford and *Edwin C. Ewing*, with whom *Mr. J. F. Vizzard* was on the brief, submitted for Carley & Hamilton, Inc., et al., appellants.

Messrs. W. R. Crawford and *Henry Hatchkiss*, with whom *Mr. J. F. Vizzard* was on the brief, submitted for Cottingham, et al., appellants.

Messrs. U. S. Webb, Attorney General of California, and *William F. Cleary*, Deputy Attorney General, with

whom *Alberta Belford* was on the brief, for Snook, appellee.

Mr. JUSTICE STONE delivered the opinion of the Court.

These are appeals under § 266 of the Judicial Code, from final decrees of District Courts of three judges for the Northern District of California. Each, on motion to dismiss the complaint, dissolved a temporary injunction, dismissed the complaint and upheld the constitutionality of § 77 (b) and (c) of the Motor Vehicle Act of California, 1923 California Statutes, c. 266, as amended, 1927 California Statutes, c. 844. Section 36 (a) requires every motor vehicle operated upon the public highways of the state to be registered. Under § 77 (a) an annual fee of $3.00 is exacted for the registration of all motor vehicles. By subsections (b) and (c), printed in the margin so far as relevant,[1] a graduated license or registration fee, payable

[1] Sec. 77. Registration fees. (a) A registration fee of three dollars shall be paid to the division for the registration of every motor vehicle, trailer or semitrailer, except for those which are exempted in this act, and such fee shall be paid at the time application is made for registration.

(b) In addition to the registration fee specified in subdivision (a) of this section, there shall be paid for the registration of every electric passenger motor vehicle a registration fee of ten dollars, and for the registration of every electric motor vehicle designed, used or maintained primarily for the transportation of passengers for hire, or for the transportation of property, there shall be paid fees according to the following schedule:

For each such vehicle weighing when unladen, less than six thousand pounds	$50.00
For each such vehicle weighing, when unladen, six thousand pounds or more, but less than ten thousand pounds	70.00
For each such vehicle weighing, when unladen, ten thousand pounds or more	90.00

(c) The following registration fees in addition to the registration fee specified in subdivision (a) of this section, shall be paid for the registration of vehicles, including trailers and semitrailers, designed,

in advance, is exacted for registration of motor vehicles used for transportation "of passengers for hire or for transportation of property." The duty of enforcing the Act is committed to the appellee, the Chief of the Division of Motor Vehicles, who is required to deposit the fees collected in the state treasury to the credit of the "motor vehicle fund." After deductions for the support of the Division of Motor Vehicles, the fund is required to be expended, one-half by paying it over to the counties, to be used by them in the construction and maintenance of public roads, the other half for the maintenance of state roads.

Under §§ 51 and 153 (c), operation of a motor vehicle for which the registration fees have not been paid is a

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used or maintained primarily for the transportation of passengers for hire or for the transportation of property, according to the following table, except that the fees specified in this subsection need not be paid for electric vehicles.

When such vehicles are equipped wholly with pneumatic tires:

For each such vehicle weighing, when unladen, three thousand pounds or more, but less than six thousand pounds	$15.00
For each such vehicle weighing, when unladen, six thousand pounds or more, but less than ten thousand pounds and limited under the provisions of this act to a total weight, including vehicle and load, not exceeding twenty-two thousand pounds	40.00
For each such vehicle weighing, when unladen, ten thousand pounds or more and limited under the provisions of this act to a total weight, including vehicle and load, not exceeding twenty-two thousand pounds	50.00
For each such vehicle weighing, when unladen, six thousand pounds or more and entitled under the provisions of this act to a total weight, including vehicle and load, in excess of twenty-two thousand pounds	70.00

When such vehicles are not equipped wholly with pneumatic tires there shall be paid in addition to the fees specified in subdivision (a) of this section fees according to the weight thereof unladen amounting to twice the fees set forth in the foregoing table.

misdemeanor, punishable by fine of not more than $500, or imprisonment for not more than six months, or both. By § 81, fees not paid for thirty days after they become due are doubled. Their payment is secured by a lien upon the vehicles required to be registered, enforcible by seizure and sale.

Incorporated cities in California may enact ordinances requiring license fees for the operation of motor vehicles used in transporting passengers for hire, and property, within city limits. Constitution of California, Art. XI, §§ 11, 12; § 145 Motor Vehicle Act. It is conceded that all California cities have passed ordinances imposing such registration fees, varying from $5 to $42 per motor vehicle, in addition to those scheduled in § 77, and that 75% of the fees collected under these ordinances are applied to the maintenance of streets in cities.

The appellants in both suits are owners of motor vehicles of various types, described in § 77 (b) or (c), which appellants in No. 86 operate exclusively over highways within the limits of incorporated cities, and which appellants in No. 267 operate over highways principally within but partly without city limits. Both complaints assail the validity of the Act under the Constitution of California and the Fourteenth Amendment of the Federal Constitution. The bill in No. 86 was filed December 29, 1928. Its allegations, admitted by the motion to dismiss, are that the appellants will be required to pay license fees for the ensuing year on or before January 31st, 1929, in order to use their motor vehicles upon streets of incorporated cities, and to avoid the destruction of their business and irreparable loss by the seizure and sale of their motor vehicles and the imposition of the penalties of the Act, which appellee threatens to enforce. See *Packard* v. *Banton*, 264 U. S. 140.

Appellants insist that the registration fees imposed by § 77 (b) and (c) are in effect tolls for the use of the high-

ways maintained by the state, see *Matter of Application of Schuler,* 167 Cal. 282, 290; *Bacon Service Corp.* v. *Huss,* 199 Cal. 21, 29, and as they pay the license tax imposed by the cities for the use of city streets, the exaction of the additional "tolls" with respect to highways outside of cities, which appellants in No. 86 do not use and which the appellants in No. 267 use less than the city streets, is a violation of the Fourteenth Amendment.

This argument is based upon cases in this Court arising, not under the Fourteenth Amendment, but the commerce clause of the Constitution, where the tax assailed was levied by a state on interstate carriers and purported to be exacted for their use of the state highways. In such cases this Court must ascertain whether a forbidden burden is imposed on interstate commerce. For that purpose it may inquire whether the tax bears some reasonable relation to the use of the state facilities by the carrier. *Sprout* v. *South Bend,* 277 U. S. 163; *Interstate Busses Corporation* v. *Blodgett,* 276 U. S. 245, 246; *Hendrick* v. *Maryland,* 235 U. S. 610; *Kane* v. *New Jersey,* 242 U. S. 160; *Clark* v. *Poor,* 274 U. S. 554.

But we are now concerned only with the use of motor cars in intrastate commerce, and, in any case, not the precise name which may be given to the money payment demanded, but its effect upon the persons paying it, is of importance in determining whether the Constitution is infringed. Whatever other descriptive term may be applied to the present registration fees, they are exactions, made in the exercise of the state taxing power, for the privilege of operating specified classes of motor vehicles over public highways, and expended for state purposes. Such fees, if covered into the state treasury and used for public purposes, as are general taxes, obviously would not offend against the due process clause. Nor can we see that they do so the more because the state has designated the particular public purposes for

which they may be used. There is nothing in the Federal Constitution which requires a state to apply such fees for the benefit of those who pay them. See *Thomas* v. *Gay*, 169 U. S. 264, 280.

A corollary of this contention is that although the fees are not *per se* disproportionate to the privilege of operating over all the highways of the state, appellants are nevertheless entitled to receive licenses limiting the operation of their motor cars to the few highways which they wish to use, upon payment of correspondingly reduced fees. But no constitutional principle is suggested, and we know of none, which would enable a licensee thus to regulate the extent of the privilege granted or to assail an otherwise valid tax upon it merely because a reduction of the privilege and the tax would better suit his convenience or his pocketbook.

The objection that the appellants should not be required to pay the challenged fees because they are already paying the city license tax is but the familiar one, often rejected, that a state may not, by different statutes, impose two taxes upon the same subject matter, although, concededly, the total tax, if imposed by a single taxing statute, would not transgress the due process clause. See *Swiss Oil Corporation* v. *Shanks*, 273 U. S. 407, 413; *St. Louis, Southwestern Ry. v. Arkansas*, 235 U. S. 350, 367, 368; *Shaffer* v. *Carter*, 252 U. S. 37, 58; *Fort Smith Lumber Co.* v. *Arkansas*, 251 U. S. 532, 533.

Only a word need be said of appellants' contention that the exemption of all vehicles weighing less than 3,000 pounds, although their loaded weight may be much more than vehicles not exempt, infringes the equal protection clause of the Fourteenth Amendment and the similar § 21 of Art. I of the State Constitution.[2] That the legislature

[2] " . . . Nor shall any citizen, or class of citizens, be granted privileges or immunities which, upon the same terms, shall not be granted to all citizens."

may graduate the fees according to the propensities of the vehicles to injure or to destroy the public highways, and may exempt those with respect to which this tendency is slight or nonexistent, cannot be doubted. We may not assume that vehicles weighing less than 3,000 pounds, with loads which they usually carry, are not of this class, or that vehicles weighing more than 3,000 pounds with their accustomed burden added do not have this tendency. It is for the legislature to draw the line between the two classes. *Magoun* v. *Illinois Trust & Savings Bank,* 170 U. S. 283, 300, 301; *Clark* v. *Titusville,* 184 U. S. 329, 331; *Quong Wing* v. *Kirkendall,* 223 U. S. 59, 62; *Citizens Telephone Co.* v. *Fuller,* 229 U. S. 322; *Watson* v. *State Comptroller,* 254 U. S. 122, 125; *Franchise Motor Freight Assn.* v. *Seavey,* 196 Cal. 77, 81; *In re Schmolke,* 199 Cal. 42, 48; cf. *Fifth Avenue Coach Co.* v. *New York,* 221 U. S. 467, 484; *Packard* v. *Banton, supra; Silver* v. *Silver,* 280 U. S. 117, 123.

These conclusions are decisive of the like questions raised in No. 267. An additional objection raised in that suit is that the registration fees under § 77 are "tolls" prohibited by the Federal Highway Act, 42 Stat. 212, under which the state has received grants of federal aid for the construction and reconstruction of highways. Section 9 of the Federal Highway Act provides "that all highways constructed or reconstructed under the provisions of this Act shall be free from tolls of all kinds."

The present registration fees cannot be said to be tolls in the commonly accepted sense of a proprietor's charge for the passage over a highway or bridge, exacted when and as the privilege of passage is exercised. See *Huse* v. *Glover,* 119 U. S. 543, 548; *Sands* v. *Manistee River Imp. Co.,* 123 U. S. 288, 293; *St. Louis* v. *Western Union Telegraph Co.,* 148 U. S. 92, 97. The fact that registration fees are imposed generally upon all residents who use motor vehicles within the state, without reference to any

particular highways or to the extent or frequency of the use, and that, as in California, they are not exacted of non-resident automobilists passing through the state (1923 California Statutes, c. 266, § 47,) marks them as demands of sovereignty, not of proprietorship, and likens them to taxes rather than tolls. The fact that they may have been held justified, in other connections, because of their similarity to "tolls for the use of highways" affords no basis for saying that the present fees are prohibited tolls within the meaning of the Federal Highway Act.

Such fees were a common form of state license tax before the Federal Highway Act was adopted in 1921. That act contemplated the continued maintenance by the States of state highways, constructed with federal aid, the expense of which must necessarily be defrayed from revenues derived from state taxation. It cannot be supposed that Congress intended to procure the abandonment by the states of this well recognized type of taxation without more explicit language than that prohibiting tolls found in § 9. Judgments in both cases

Affirmed.

OHIO EX REL. BRYANT *v.* AKRON METROPOLITAN PARK DISTRICT ET AL.

OHIO EX REL. WADSWORTH *v.* ZANGERLE ET AL.

APPEALS FROM THE SUPREME COURT OF OHIO.

Nos. 237 and 238. Argued February 27, 28, 1930.—Decided March 12, 1930.

1. An Ohio statute empowers the probate judge of any county, upon petition and after notice and hearing, to establish a park district, if he finds the proceedings regular and that the district will be conducive to the general welfare, and thereupon to appoint a board of park commissioners of the district. It empowers the board, so appointed, to acquire lands within the district for the conservation of its natural resources, and to that end to create parks, parkways

and other reservations and develop, improve and protect the same in such manner as they may deem conducive to the general welfare; to lay assessments upon specially benefited lands in proportion to, and not exceeding, the special benefits conferred by the development or improvement; to levy limited taxes upon all taxable property within the district; and to adopt regulations for the preservation of good order within and adjacent to such parks and reservations and of property and natural life therein, violation of which regulations shall constitute a misdemeanor. It further provides for annexing additional territory to a district through probate court proceedings in the county embracing the additional territory, and for the levying of additional taxes for the use of a district when authorized by the electors of the district at an election to which the question is submitted by the board. The board is empowered to issue bonds in anticipation of the collection of such levy for the purpose of acquiring and improving lands. *Held* that no substantial federal question is presented by a contention that the statute, in delegating legislative power to the probate court and the non-elective commissioners, violates the Fourteenth Amendment. P. 79.

2. Section 2 of Article IV of the Ohio Constitution, providing that "no law shall be held unconstitutional and void by the Supreme Court without a concurrence of at least all but one of the judges, except in the affirmance of a judgment of the Court of Appeals declaring a law unconstitutional and void," *held* not violative of the due process or equal protection clauses of the Fourteenth Amendment. P. 79.
3. It is well settled that questions arising under the guaranty to every State of a republican form of government (Const. Art. IV, § 4,) are political,—for Congress and not for the courts. P. 79.
4. The right of appeal is not essential to due process, provided that due process has already been accorded in the tribunal of first instance. P. 80.
5. The equal protection clause is not violated by diversity in the jurisdiction of the several courts of a State as to subject matter or finality of decision if all persons within the territorial limits of the respective jurisdictions of the state courts have an equal right in like cases under like circumstances to resort to them for redress. P. 81.

120 Oh. St. 464, affirmed.

APPEALS from judgments of the Supreme Court of Ohio, affirming, as a result of a divided court and a pro-

vision of the State Constitution (Art. IV, § 2,) judgments of the Court of Appeals sustaining the Ohio Park District Act in two suits brought by taxpayers to restrain its enforcement. The appeals were also directed to orders of the court below overruling motions to vacate its judgments of affirmance and to enter judgments of reversal.

Messrs. Frederick A. Henry and *Luther Day,* with whom *Mr. George D. Hile* was on the brief, for appellants.

Messrs. Chester L. Dinsmore, Frederick W. Green, Joseph A. H. Myers and *William A. Spencer* were on the brief for the Akron Metropolitan Park District et al., appellees.

Messrs. Frederick W. Green, Newton D. Baker, William C. Boyle and *Thomas M. Kirby* were on the brief for Zangerle et al., appellees.

Mr. Chief Justice Hughes delivered the opinion of the Court.

These two cases were argued together and present substantially the same questions. Each suit was brought in the state court by a taxpayer attacking the validity of the Park District Act of the State (General Code of Ohio, secs. 2976–1 to 2976–10i; 107 O. L. 65–69, 108 O. L., pt. 2, 1097–1100). The one suit related to the Park District Board of the Akron District, and the other to that of the Cleveland District, and in each suit the taxpayer sought an injunction against the Park Boards, respectively, together with the auditor of the county where the Board revenues and disbursements are handled, from expending public moneys, or incurring obligations requiring such expenditure, and from taking any other official action on behalf of the district. The statute was assailed as being in violation of the constitution of the State and also of the due process and equal protection clauses of the Fourteenth Amendment of the Federal Constitution. The

validity of the act was sustained by the Court of Common Pleas, and by the Court of Appeals, of the counties where the suits were brought. On error proceedings from these judgments, the cases were heard together in the Supreme Court of the State, and that court was divided in opinion, two of the justices holding the statute to be valid, and five of them being of the contrary view. Section 2 of Article IV of the constitution of Ohio provides that "no law shall be held unconstitutional and void by the Supreme Court without a concurrence of at least all but one of the judges, except in the affirmance of a judgment of the Court of Appeals declaring a law unconstitutional and void." Accordingly, in these suits, the judgments in favor of the defendants were affirmed by the Supreme Court and, thereupon, motions were made in that court to vacate the judgments and to enter judgments of reversal. It was then alleged that the above-mentioned provision of the constitution of the State was in conflict with the Fourteenth Amendment of the Federal Constitution in that it denied to citizens of Ohio due process of law and the equal protection of the laws, and also that the provision was repugnant to Section 4 of Article IV of the Federal Constitution assuring to every State a republican form of government. The Supreme Court of the State overruled the motions, and from the judgments of affirmance, and the orders denying the motions to vacate, appeals have been taken to this Court.

The grounds for attack, under the Fourteenth Amendment, on the validity of the Park District Act relate to the organization and powers of the Park District Boards. The act provides for the presentation to the probate judge of the county of a petition for the establishment of the proposed district and, after notice and hearing, the probate judge, with or without diminishing or altering, but without enlarging, the suggested boundaries, is to enter an order creating the district, provided he finds the

proceedings to be regular and that the creation of the district will be conducive to the general welfare. The probate judge is then to appoint three commissioners who are to constitute the Board of Park Commissioners of the district, being a body politic and corporate. The Board thus constituted is to have power to acquire lands within the district for the conservation of its natural resources and, to that end, may create parkways, parks and other reservations of land, and develop, improve and protect the same in such manner as they may deem conducive to the general welfare. The Board is authorized to lay assessments upon specially benefited lands in an amount not exceeding, and in proportion to, the special benefits conferred by the development or improvement. The Board is also authorized to levy taxes upon all taxable property within the district in an amount not in excess of one-tenth of one mill upon each dollar of the assessed value of the property in the district in any one year, subject, however, to the combined maximum levy for all purposes otherwise provided by law. On further petitions, and on the determination by the Park Board of the advisability of the annexation of additional territory, whether located within or without the county in which the district is created, the probate court of the county within which the additional territory is located, in proceedings similar to those originally instituted, may provide for such annexation. The Board is also authorized to adopt by-laws, rules and regulations for the preservation of good order within and adjacent to the parks and reservations of land under their jurisdiction and of property and natural life therein. The violation of such by-laws, rules or regulations constitutes a misdemeanor. The Board may submit to the electors of the district the question of levying additional taxes for the use of the district, declaring the necessity of such levy, the purpose for which the taxes are to be used, the annual rate proposed and

the number of consecutive years that such rate shall be levied. If a majority of the electors voting upon the question favor the levy, such taxes shall be levied accordingly, provided the rate submitted to the electors at any one time shall not exceed one-tenth of one mill annually upon each dollar of valuation. The Board is empowered to issue bonds, in anticipation of the collection of such levy, for the purpose of acquiring and improving lands.

It was insisted by the taxpayers, plaintiffs in the state court, that these statutory provisions involved an unconstitutional delegation of legislative power to the probate court and to the nonelective park commissioners. We do not consider it necessary to consider at length this objection, or the other points sought to be made against the statute under the Fourteenth Amendment, as, in view of the repeated decisions of this Court, we do not find any substantial Federal question presented. *Houck* v. *Little River Drainage District,* 239 U. S. 254, 262; *Orr* v. *Allen,* 245 Fed. 486, 248 U. S. 35; *Soliah* v. *Heskin,* 222 U. S. 522.

The question with respect to the validity, from a Federal standpoint, of the provision of the state constitution that no law shall be held unconstitutional by the Supreme Court of the State without a concurrence of at least all but one of the judges, except in the affirmance of a judgment of the Court of Appeals declaring a law unconstitutional, was not raised in these suits until after the judgments of affirmance by the Supreme Court. But it is insisted that the point could not have been taken earlier, as in advance of the affirmance on a vote of the minority the question would have been speculative. Hence, it is said that the Federal question was raised at the earliest opportunity. (*Saunders* v. *Shaw,* 244 U. S. 317, 320.) Assuming that the Federal question is thus brought here, we find it to be without merit.

As to the guaranty to every State of a republican form of government (Sec. 4, Art. IV), it is well settled that the

questions arising under it are political, not judicial, in character and thus are for the consideration of the Congress and not the courts. *Pacific States Telephone & Telegraph Co.* v. *Oregon*, 223 U. S. 118; *O'Neill* v. *Leamer*, 239 U. S. 244, 248; *State of Ohio ex rel. Davis* v. *Hildebrant, Secretary of State of Ohio*, 241 U. S. 565; *Mountain Timber Co.* v. *State of Washington*, 243 U. S. 219, 234.

As to the due process clause of the Fourteenth Amendment, it is sufficient to say that, as frequently determined by this Court, the right of appeal is not essential to due process, provided that due process has already been accorded in the tribunal of first instance. *McKane* v. *Durston*, 153 U. S. 684, 687; *Pittsburgh, etc. Railway Co.* v. *Backus*, 154 U. S. 421, 427; *Reetz* v. *Michigan*, 188 U. S. 505, 508; *Rogers* v. *Peck*, 199 U. S. 425, 435; *Standard Oil Company of Indiana* v. *State of Missouri*, 224 U. S. 270, 286. The opportunity afforded to litigants in Ohio to contest all constitutional and other questions fully in the Common Pleas Court and again in the Court of Appeals plainly satisfied the requirement of the Federal Constitution in this respect and the State was free to establish the limitation in question in relation to appeals to its Supreme Court in accordance with its views of state policy.

In invoking the equal protection clause of the Fourteenth Amendment, it is argued that the result of the application of the provision of the state constitution may be that the same statute may be held constitutional in a case arising in one county, and unconstitutional in another case arising in another county. This point is obviously not of importance in relation to the question of the validity of the Park District Act under the Federal Constitution, as the Act of Congress makes appropriate provision for the hearing and determination by this Court of such a question where a Federal right has been passed upon by the highest court of the State in which a deci-

sion could be had. But it is said that, from the standpoint of the state constitution, the statute may operate unequally. It is unnecessary to comment on this point so far as the mere inconvenience which may be caused by possible conflicts is concerned. It is urged that the situation has been described as deplorable by the Supreme Court of the State (*Board of Education* v. *Columbus*, 118 O. S. 295) but it is not for this Court to intervene to protect the citizens of the State from the consequences of its policy, if the State has not disregarded the requirements of the Federal Constitution. In the present instance, there has been as yet no conflict of decision. The provision of the state constitution which is attacked is one operating uniformly throughout the entire State. The State has a wide discretion in respect to establishing its systems of courts and distributing their jurisdiction. It has been held by this Court that the equal protection clause of the Fourteenth Amendment is not violated by diversity in the jurisdiction of the several courts of a State as to subject matter or finality of decision if all persons within the territorial limits of the respective jurisdictions of the state courts have an equal right in like cases under like circumstances to resort to them for redress. A State "may establish one system of courts for cities, and another for rural districts, one system for one portion of its territory, and another system for another portion." *Missouri* v. *Lewis*, 101 U. S. 22, 30, 31. Different courts of appeal may be set up for different portions of the State. *Id.*, p. 33. It is thus well established that there is no requirement of the Federal Constitution that the State shall adopt a unifying method of appeals which will insure to all litigants within the State the same decisions on particular questions which may arise. *Missouri* v. *Lewis, supra; Pittsburgh etc. Railway Co.* v. *Backus*, 154 U. S. 421, 427; *Mallett* v. *North Carolina*, 181 U. S. 589, 597–599.

Judgments affirmed.

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RAILROAD COMMISSION OF WISCONSIN ET AL. *v.* MAXCY, RECEIVER.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WISCONSIN.

No. 301. Argued March 6, 1930.—Decided March 12, 1930.

A decree of the District Court of three judges enjoining a state commission from enforcing an order fixing the rates of a public utility, upon the ground that the commission's valuation of the company's property was not supported by the evidence, without other statement of facts or reasons, is *set aside* and the cause remanded with directions to state findings of fact and conclusions of law and enter a decree thereon, the restraining order to be continued pending further action by the court below.

Mr. Suel O. Arnold, Assistant Attorney General of Wisconsin, with whom *Mr. John W. Reynolds,* Attorney General, was on the brief, and *Mr. Adolph Kanneberg* for appellants.

Messrs. H. L. Butler, H. H. Thomas, B. H. Stebbins, R. M. Stroud and *R. M. Rieser* were on the brief for respondent.

PER CURIAM.

This is an appeal from the decree of the District Court, composed of three judges as required by the statute, enjoining the appellants from enforcing an order of the Railroad Commission of Wisconsin fixing rates to be charged by the receiver of the Washburn Water Works Company for supplying water. The District Court gave no opinion and, aside from the general recital in the decree that the court had considered the evidence submitted by the parties and that it appeared therefrom that the

valuation fixed by the Railroad Commission of the property of the Company for rate making purposes was not supported, the record contains no finding whatever by the District Court.

This Court has repeatedly adverted to the importance in a suit of this character of a statement by the District Court of the grounds of its decision. *Virginian Railway Company* v. *United States,* 272 U. S. 658, 674, 675; *Lawrence, et al.* v. *St. Louis-San Francisco Railway Company,* 274 U. S. 588, 596; *Cleveland, etc. Ry. Co.* v. *United States,* 275 U. S. 404, 414; *Baltimore & Ohio Railroad Company* v. *United States,* 279 U. S. 781, 787.

In *Lawrence, et al.* v. *St. Louis-San Francisco Railway Company, supra,* the court said: "The importance of an opinion to litigants and to this Court in cases of this character was pointed out in *Virginian Ry. Co.* v. *United States,* 272 U. S. 658, 675. The importance is even greater where the decree enjoins the enforcement of a state law or the action of state officials thereunder. For then, the respect due to the State demands that the need for nullifying the action of its legislature or of its executive officials be persuasively shown."

In the present instance this Court should have the aid of appropriate findings by the District Court of the facts which underlie its conclusions.

The decree is set aside, and the cause is remanded to the District Court, specially constituted as provided by the statute, to state its findings of fact and conclusions of law and enter a decree thereon, the restraining order entered in this suit to be continued pending further action by the District Court.

Decree set aside.

EARLY, RECEIVER, *v.* FEDERAL RESERVE BANK OF RICHMOND.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

No. 226. Argued February 26, 27, 1930.—Decided March 12, 1930.

A circular of a federal reserve bank, authorized by law, provided that when checks were received by the reserve bank for collection and forwarded to the member bank on which they were drawn, the drawee should remit or provide funds to meet them within an agreed transit time, failing which the amount should be chargeable against the reserve account of the drawee in the reserve bank; but that the reserve bank reserved the right to charge checks so forwarded against the drawee's reserve account at any time when in any particular case it deemed it necessary to do so. *Held:*

1. That the last provision, consented to by the drawee bank, created a power, in the interest and for the security of the owners of such checks, which was not revoked by insolvency of the drawee bank, and that upon learning of such insolvency it became the duty of the reserve bank, even though the transit time had not expired, to charge such checks against the reserve account of the drawee. P. 89.

2. This lien was not affected by the fact that the drawee bank had retained the right to draw drafts on the reserve. P. 90.

30 F. (2d) 198, affirmed.

CERTIORARI, 280 U. S. 540, to review a judgment of the Circuit Court of Appeals reversing in part a judgment of the District Court recovered by the Receiver in a suit against the Reserve Bank.

Messrs. George P. Barse and *R. E. Whiting*, with whom *Mr. F. G. Awalt* was on the brief, for petitioner.

There was neither agreement of the parties, nor understanding implied from the terms of collection, to treat the reserve deposit balance either as equitably assigned or as a specified fund pledged to the payment of the accepted checks,

All that the parties agreed was that the obligations incurred by the Lake City Bank by the acceptance of the checks should be paid by specified dates, which dates were shown in the cash letters in which the checks were sent. See *National City Bank* v. *Hotchkiss*, 231 U. S. 50. It was left to the drawee bank to provide funds for payment in the manner most convenient to itself, either by special remittance for the particular purpose, or by providing through general remittances for a sufficient balance in the reserve account, available at the expiration of the transit period to the Reserve Bank, to meet the cash letters. Either method served the same end—to pay a debt which by agreement of the parties was to be paid at Richmond on a fixed day.

Here, as in *Commercial National Bank* v. *Armstrong*, 148 U. S. 50, the owners of the checks became general creditors of the drawee when their checks were accepted and canceled. The terms upon which the checks were handled provided for a three day transit period. How the funds might be provided—whether from existing reserve balances, prospective reserve balances, shipments of currency, drafts upon other depositories, or otherwise—was not the concern of the owners of the checks, and no right was given them to demand that the reserve balances of the drawee bank should not be drawn upon for other purposes.

Customers of the Reserve Bank sending checks to it for collection are charged with notice of the provisions in the circular, permitting the drawee bank to pay for the checks otherwise than by appropriation of its reserve balance. They are also charged with notice of the provisions of § 19 of the Federal Reserve Act permitting the reserve accounts of member banks to be checked against or withdrawn. It is also to be noted that the customer banks assume the risk of failure and suspension of the drawee bank and agree that in such event checks for

which remittance is not made may be charged back to their accounts by the Reserve Bank.

The right of the Lake City Bank to draw upon the reserve at will is clearly inconsistent with any theory of equitable charge or lien arising against the deposit. Distinguishing *Fourth Street Bank* v. *Yardley*, 165 U. S. 634.

An agreement to remit for collection items, even where the remittance is to be made by a draft or a charge against a particular deposit account, does not constitute an assignment or create an equitable charge against the deposit. *Christmas* v. *Russell*, 14 Wall. 69.

An agreement to pay out of a particular fund, however clear its terms, is not an equitable assignment, if the assignor retains any control over the fund. *Christmas* v. *Russell, supra*, 84; *Meyer* v. *Delaware R. Constr. Co.*, 100 U. S. 457; *Williams* v. *Everett*, 14 East. 582, cited in *Tiernan* v. *Jackson*, 5 Pet. 580, 600; *Smedley* v. *Speckman*, 157 Fed. 815, 819.

The principles governing the right of equitable lien likewise impose a duty on the part of the fundholder to devote the pledged fund to the purpose intended. *Interborough Consolidated Corp.* case, 288 Fed. 334 (certiorari denied, *Porges* v. *Sheffield*, 262 U. S. 752); *Woodhouse* v. *Crandall*, 197 Ill. 104, 109; Pomeroy, Eq. Jur. (4th ed.) § 1235; *United States* v. *Butterworth-Judson Corp.*, 267 U. S. 387. Distinguishing cases cited by the court below.

The exercise of the clearing-house functions of the Reserve Bank was not based on the faith of the reserve balance of the member bank.

Under the terms of § 16 of the Federal Reserve Act, the exercise of clearing-house functions was permissive but not mandatory. U. S. C. Title 12, § 248 (m). This was seemingly considered a minor part of the reserve system activities. There is no indication from any of the provisions of the Act that clearing-house functions were

even remotely in mind so far as the statutory provision for reserve balances was concerned.

It seems clear that the customers of the Reserve Bank do not send items to it on the faith of the reserve balance of the drawee bank and that they rely entirely upon the unsecured obligation of the drawee to provide available funds at the expiration of the transit period.

The Reserve Bank has no right to apply the deposit by way of set-off. See *National Bank* v. *Insurance Co.*, 104 U. S. 54, 71; *Scott* v. *Armstrong*, 146 U. S. 499.

The authority of the Reserve Bank to withdraw funds from the reserve account of its member bank was revoked by the insolvency of the member bank. *First National Bank of Chicago* v. *Selden*, 120 Fed. 212; *Scott* v. *Armstrong*, 146 U. S. 499, 507; *Edison Electric Illuminating Co.* v. *Tibbetts*, 241 Fed. 468.

The provision in Circular No. 143 giving the Reserve Bank the right to charge the Lake City Bank's reserve account "at any time when in any particular case we deem it necessary to do so," is on exactly the same fundamental basis as the authority to charge at the expiration of the transit period, the only difference being as to the point in time when such authority might have been executed. Its revocation resulted from the suspension of the Lake City Bank, just as the revocation of the authority to charge at the expiration of the transit period. Distinguishing *McDonald* v. *Chemical National Bank*, 174 U. S. 610.

The lack of agency between the Lake City Bank and the Reserve Bank does not prevent the application of the revocation of authority doctrine.

Equitable Trust Co. v. *First National Bank of Trinidad*, 275 U. S. 359, is authority against the position of the Reserve Bank.

Mr. M. G. Wallace for respondent.

Messrs. F. G. Awalt and *George P. Barse,* by special leave of Court, filed a brief as *amici curiae,* on behalf of J. W. Pole, Comptroller of the Currency.

MR. JUSTICE HOLMES delivered the opinion of the Court.

This is a suit brought by the receiver of a national bank in South Carolina, a member of the Federal Reserve System, to recover the reserve balance of that bank in the hands of the Federal Reserve Bank of Richmond at the end of business on October 9, 1926, when the South Carolina Bank, being insolvent, closed its doors. Other matters tried below are not in question here. The Richmond Bank claims the right to retain the balance on the following facts. As authorized by agreement, on October 7 it forwarded to the South Carolina Bank checks drawn upon the latter which the Richmond Bank had received for collection. These checks were received the next day, marked paid and charged to the accounts of the drawers. Other checks were forwarded on October 8 and marked paid and charged to the drawers by the South Carolina Bank on October 9. After notice of the failure the Richmond Bank on October 11 charged the account of the South Carolina Bank with the amount of the checks forwarded on October 7 and the next day charged what was left with the amount sent on October 8.

The relations between the two Banks were fixed by the following terms of a circular of the Richmond Bank which was authorized by law and agreed to by the other. "Checks received by us drawn on our member banks will be forwarded in cash letters direct to such banks and each member bank will be required either to remit therefor in immediately available funds or to provide funds available to us to meet such cash letters within the agreed transit time to and from the member bank. Therefore, the

amount of any cash letter to a member bank is chargeable against available funds in the reserve account of such member at the expiration of such transit time, which date will be shown on each cash letter. The right is reserved, however, to charge a cash letter to the reserve account of a member bank at any time when in any particular case we deem it necessary to do so." The transit time or time allowed for collection in this case was three days, and had not expired when the South Carolina Bank closed its doors. The Circuit Court of Appeals sustained the claim of the Richmond Bank. 30 F. (2d) 198. A writ of certiorari was granted by this Court.

The petitioner contends that his bank had until the end of the transit time to remit or to provide funds to meet the cash letters, that until then the Richmond Bank had a bare power of attorney to charge the reserve fund, and that the power was revoked by the insolvency of the petitioner's bank. He denies that the reserve fund was subject to any lien until that date, and calls attention to the right of his bank to draw checks against that fund reserved to it by the law. Code, Tit. 12, § 464.

All parties must be taken to have dealt upon the terms of the circular that we have quoted. The right of the South Carolina Bank to draw against its reserve account was subject to the right of the Richmond Bank that held the account to charge it with a cash letter whenever deemed necessary. This power is reserved more obviously in the interest of the depositors of the checks than of the Richmond Bank. The latter received the checks for collection with responsibility only for its own negligence. The depositor took the chance of finding that his only debtor was a distant bank in place of the maker of the check discharged (*Federal Reserve Bank of Richmond* v. *Malloy,* 264 U. S. 160, 166,)—a bank that might be insolvent, as this one was. His situation was the one that

most needed the power to charge the reserve. The language of the circular pointed to the depositor's interest—for the cash letter that was to be charged was merely another name for the checks that the letter contained. The existence of the power must be assumed to have been one of the considerations inducing the owner of the check to give the Richmond Bank authority to send it directly to the drawee. All parties must be taken to have understood that in the event that happened it was the duty of the Richmond Bank when it knew the facts to charge the reserve account of the South Carolina Bank, and if so the account should be charged. There was no overt act necessary in addition to what the parties had agreed upon. The case of *Equitable Trust Co.* v. *First National Bank of Trinidad,* 275 U. S. 359, cited by the petitioner, has no application because there in the opinion of the Court there was no attempt to create a lien upon an identified fund, whereas here the reserve was identified. The fact that the fund might be diminished by drafts of the South Carolina Bank does not invalidate the lien, any more than the right of a depositor to draw against his account invalidates a banker's lien, not to speak of the paramount power of the Richmond Bank mentioned above.

Judgment affirmed.

GUNNING *v.* COOLEY.

CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 31. Argued November 26, 1929.—Decided March 12, 1930.

1. A mere scintilla of evidence is not enough to require the submission of an issue to the jury in the Supreme Court of the District of Columbia. P. 94.
2. Upon a motion for a peremptory instruction the question is not whether there is literally no evidence, but whether there is any

upon which a jury can properly find a verdict for the party producing it, upon whom the *onus* of proof is imposed. P. 94.

3. In determining a motion by the defendant for a peremptory instruction, the court assumes that the evidence for the plaintiff proves all that it reasonably may be found sufficient to establish and that from such facts there should be drawn in favor of the plaintiff all the inferences that fairly are deducible from them. P. 94.
4. Where uncertainty as to the existence of negligence arises from a conflict in the testimony or because, the facts being undisputed, fair-minded men will honestly draw different conclusions from them, the question is not one of law but of fact to be settled by the jury. P. 94.
5. In an action for personal injuries due to negligence, the burden is on the plaintiff to establish the negligence and the injury alleged; and, if the evidence fails adequately to support either element, the defendant's motion for a peremptory instruction should be granted. P. 95.
6. Plaintiff's evidence *examined* and found sufficient to justify a finding by the jury that the defendant, while treating her as her physician, negligently put some harmful fluid into her ears, causing her pain and injury. P. 95.
7. Upon a review by certiorari, this Court is not called on to consider any question not raised by the petition for the writ. P. 98.

30 F. (2d) 467, affirmed.

CERTIORARI, 279 U. S. 828, to a judgment of the Court of Appeals of the District of Columbia affirming a judgment of the Supreme Court of the District for the plaintiff in an action for personal injuries.

Mr. H. Prescott Gatley, with whom *Messrs. Benjamin S. Minor* and *Arthur P. Drury* were on the brief, for petitioner.

Mr. Alvin L. Newmyer, with whom *Mr. Ralph A. Cusick* was on the brief, for respondent.

MR. JUSTICE BUTLER delivered the opinion of the Court.

Respondent brought this action in the supreme court of the District of Columbia to recover damages from peti-

tioner, a practicing physician, for injuries claimed to have been caused by his negligence while treating her. Her complaint is that he put into her ears some tissue-destroying liquid, which for brevity we shall refer to as acid, and thereby injured the drums and other parts of her ears. The jury returned a verdict for the plaintiff and the judgment thereon was affirmed in the Court of Appeals. 30 F. (2d) 467.

At the close of all the evidence defendant moved the court to direct the jury to return a verdict in his favor. He maintained that the evidence failed to show that plaintiff was injured by the negligence alleged and that it left the cause of her injury in the realm of conjecture. The motion was denied. Defendant sought reversal on that ground. And that is the only ruling of which complaint was made in the petition for this writ.

An opinion written by the Chief Justice of the Court of Appeals held that the motion accepted as true plaintiff's evidence together with all inferences reasonably deducible from it, and that the motion could be granted only when all reasonable men could "draw but one conclusion from it, and that conclusion utterly opposed to plaintiff's right to recover." He cited *Railroad Co.* v. *Carrington,* 3 App. D. C. 101, 108; *Warthen* v. *Hammond,* 5 App. D. C. 167, 173; *Adams* v. *Railroad Co.,* 9 App. D. C. 26, 30; *Glaria* v. *Washington Southern R. Co.,* 30 App. D. C. 559, 563; *Catholic University* v. *Waggaman,* 32 App. D. C. 307, 320, and *Chesapeake Beach R. Co.* v. *Brez,* 39 App. D. C. 58, 69.

There was a concurring opinion by one of the associate justices and dissent by the other. The concurring justice held that under the strict rule adopted in that court there was sufficient evidence to carry the case to the jury. He said (p. 470): "It is a mere travesty to say that the court is bound to send the case to the jury, if there is any evidence tending to support the contention of the plaintiff, and shut its eyes to the justice or injustice of a verdict resting upon such a flimsy basis. It is my fixed opinion, as

expressed on many occasions, that the rule established in the decisions referred to, and in many other decisions of this court, is too strict, and should be modified to the extent of confiding in the court the power to determine whether or not the evidence is sufficient to raise a reasonable issue of fact, capable of supporting a verdict that will meet the substantial ends of justice. I trust that such a rule of procedure may yet be adopted by the unanimous concurrence of the justices of this court, as will lift the trial justice in this District from a mere automaton to the exercise of his lawful and proper judicial function of seeing that cases are submitted to juries in accordance with such lawful rules of procedure as will elicit verdicts based upon substantial issues of fact rather than mere caprice and sympathy." The dissenting justice found in the evidence "no basis whatever for the verdict and judgment."

"When, on the trial of the issues of fact in an action at law before a Federal court and a jury, the evidence, with all the inferences that justifiably could be drawn from it, does not constitute a sufficient basis for a verdict for the plaintiff or the defendant, as the case may be, so that such a verdict, if returned, would have to be set aside, the court may and should direct a verdict for the other party." *Slocum* v. *New York Life Insurance Co.*, 228 U. S. 364, 369.*

*And see *Phoenix Ins. Co.* v. *Doster*, 106 U. S. 30, 32. *Montclair* v. *Dana*, 107 U. S. 162–163. *People's Savings Bank* v. *Bates*, 120 U. S. 556, 561–562. *North Penn. Railroad* v. *Commercial Bank*, 123 U. S. 727, 733. *Kane* v. *Northern Central Railway*, 128 U. S. 91, 94. *Delaware, &c. Railroad* v. *Converse*, 139 U. S. 469, 472. *Elliott* v. *Chicago, Milwaukee, &c. Railway*, 150 U. S. 245. *Union Pacific Ry. Co.* v. *McDonald*, 152 U. S. 262, 283. *McGuire* v. *Blount*, 199 U. S. 142, 148. *Empire State Cattle Co.* v. *Atchison Ry. Co.*, 210 U. S. 1, 10. *Delk* v. *St. Louis & San Francisco R. R.*, 220 U. S. 580, 587. *Baltimore & Ohio R. R. Co.* v. *Groeger*, 266 U. S. 521, 524. *Chicago, M. & St. P. Ry. Co.* v. *Coogan*, 271 U. S. 472, 478. *St. Louis-San Francisco Ry.* v. *Mills*, 271 U. S. 344, 347–348. *New York Central R. R. Co.* v. *Ambrose*, 280 U. S. 486.

A mere scintilla of evidence is not enough to require the submission of an issue to the jury. The decisions establish a more reasonable rule "that in every case, before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the *onus* of proof is imposed." *Improvement Company* v. *Munson,* 14 Wall. 442, 448. *Pleasants* v. *Fant,* 22 Wall. 116, 122.

Issues that depend on the credibility of witnesses, and the effect or weight of evidence are to be decided by the jury. And in determining a motion of either party for a peremptory instruction, the court assumes that the evidence for the opposing party proves all that it reasonably may be found sufficient to establish and that from such facts there should be drawn in favor of the latter all the inferences that fairly are deducible from them. *Texas & Pacific Ry. Co.* v. *Cox,* 145 U. S. 593, 606. *Gardner* v. *Michigan Central Railroad,* 150 U. S. 349, 360. *Baltimore & Ohio R. R. Co.* v. *Groeger,* 266 U. S. 521, 524, 527. Where uncertainty as to the existence of negligence arises from a conflict in the testimony or because, the facts being undisputed, fair-minded men will honestly draw different conclusions from them, the question is not one of law but of fact to be settled by the jury. *Richmond & Danville Railroad* v. *Powers,* 149 U. S. 43, 45.

Where the evidence upon any issue is all on one side or so overwhelmingly on one side as to leave no room to doubt what the fact is, the court should give a peremptory instruction to the jury. *People's Savings Bank* v. *Bates,* 120 U. S. 556, 562. *Southern Pacific Company* v. *Pool,* 160 U. S. 438, 440. "When a plaintiff produces evidence that is consistent with an hypothesis that the defendant is not negligent, and also with one that he is, his proof tends to establish neither." *Ewing* v. *Goode* (by Taft,

Circuit Judge), 78 Fed. 442, 444. See *Patton* v. *Texas & Pacific Railway Co.*, 179 U. S. 658, 663. *New York Central R. R. Co.* v. *Ambrose*, 280 U. S. 486.

The burden was on plaintiff to establish the negligence and injury alleged; and, if the evidence failed adequately to support either element, defendant's motion should have been granted. We need not consider whether the opinion written by the Chief Justice could be sustained if it stood alone. The concurrence was essential to the judgment. The concurring opinion rests upon the conception that the rule stated by the Chief Justice required denial of defendant's motion if plaintiff's claims were supported by any evidence, however slight. That is not the rule applied in federal courts. But it does not follow that a verdict should have been directed for the defendant. It remains to be considered whether, having regard to the applicable rules established by the decisions of this court, the evidence was sufficient to warrant a finding by the jury that defendant was negligent as charged and thereby injured plaintiff.

It is not claimed by plaintiff that defendant knowingly put acid in her ears, but that he negligently did so while intending to apply oil. She gave testimony that tends to show the following facts. Prior to defendant's treatment her hearing was good and she never had any disease or injury in or about either ear. She first consulted defendant on Saturday, October 21, 1922. He treated her throat. On the following Monday defendant told her that there was something wrong with her nose and that mouth breathing had made her throat sore. He treated her nose. On Wednesday she told defendant she had some cold and felt wax or something in her right ear. He examined it and said there was nothing wrong. She repeated that she felt wax in it. He then said that he would put some mineral oil in her ears. There were several small white bottles and a dropper on a cabinet in his

office. He took the dropper from one of the bottles and put some liquid in her right ear. She immediately suffered much pain, became dizzy and heard great noises in that ear. He then put some of the liquid in her left ear. She experienced the same sensations, became very ill and lost control of her body. Other evidence shows that she went or was taken to a bed in defendant's house and there remained for some hours and until a friend came and took her to her mother's home.

There was testimony given by plaintiff's mother and sister that, up to the time defendant treated her ears, plaintiff's hearing was good; that she never had any disease or injury of the ears; that, when she was brought from defendant's office, she was very ill, apparently suffered much pain, remained in bed for about two days and was deaf. On the Friday following defendant's last treatment she was taken to Doctor Patten, a specialist. He treated her daily for some months and two or three times a week until October, 1926. Then Doctor Morgan treated her twice a week until the time of the trial. Neither Doctor Patten nor Doctor Morgan testified at the trial. The record shows that the former could not be called, but it is silent as to the latter.

In 1923 Doctor Crisp, treating her for something else, casually examined her ears. He found the drum of the right ear broken and that of the left ear inflamed. In 1925, after the commencement of this action, at the request of the defendant, Doctor Allen was permitted to examine the plaintiff. He found both eardrums retracted and a perforation in the right but none in the left. Early in 1927, in preparation for the trial, plaintiff had Doctor Gill examine her ears. He found practically all of the right and about half of the left drum gone and that she had one-third hearing in the right and two-fifths in the left ear. He gave testimony to the effect that, if applied

to them, acid would injure or destroy eardrums and would cause pain and possibly other sensations like those which plaintiff testified she suffered at the time of the treatment.

Defendant testified plaintiff told him her hearing had become impaired and that her ears had been treated. He found both eardrums perforated. On her last visit she was nauseated and complained of dizziness and roaring in her head. He dropped mineral oil into her ears with a dropper to close up the external ears in order to prevent noise from penetrating into the middle ears. The noise subsided, she became composed, went to a bed in his house and remained until taken home by a friend. He denied that he put acid in her ears and testified that he never had any in his office.

The evidence shows that, while difficult to do, it would be possible by means of a dropper to apply acid to eardrums without allowing it to come into contact with other tissues. There was no scar or anything to indicate that acid had touched any part of the canal leading to either eardrum. Plainly it would have been impossible for defendant to have closed the external ears without allowing the liquid used for that purpose to touch the canal tissue. But plaintiff was not required specifically to show what defendant did put in her ear or that the treatment destroyed either of her eardrums or made her deaf. If the evidence was sufficient to justify a finding that defendant negligently put a harmful fluid in her ears causing her pain and injury, the motion was properly denied.

As the credibility of witnesses and the weight to be given to their testimony are for the jury, plaintiff's testimony as to the treatment and immediate effect upon her and the testimony of others as to her condition shortly afterwards constituted sufficient evidence to warrant a finding that instead of oil defendant negligently put some

harmful liquid into her ears thereby causing her pain, suffering and some injury in and about her ears. It was not necessary for the trial court in passing upon the motion to determine, and we need not consider, whether under the rules laid down in the decisions of this court the evidence was sufficient to warrant a finding that the perforation of either eardrum or permanent deafness resulted from defendant's treatment.

Defendant seeks reversal on a number of grounds that were not mentioned in his petition for the writ. But this court is not called on to consider any question not raised by the petition. *Webster Co.* v. *Splitdorf Co.*, 264 U. S. 463, 464.

Judgment affirmed.

STATEN ISLAND RAPID TRANSIT RAILWAY COMPANY *v.* PHOENIX INDEMNITY COMPANY.

APPEAL FROM THE SUPREME COURT OF NEW YORK.

No. 307. Argued March 7, 1930.—Decided March 17, 1930.

Under the Workmen's Compensation Law of New York, § 15, subdivisions 8 and 9, when an employee, in the course of his employment, suffers an injury causing death, and there are no persons entitled to compensation from the employer, the employer or his insurer shall be required by award to make payments of $500 each to the state treasurer for two special funds, which are used in furnishing additional compensation and vocational training to certain classes of disabled employees (see *Sheehan Co.* v. *Shuler*, 265 U. S. 371). These provisions are applicable where the death was due to the act of a stranger to the employment and the right of the employee's dependent to compensation under the Compensation Law was waived by collection of an equal or greater sum through settlement of an action for negligence in causing the death, brought by the decedent's personal representative, on behalf of the dependent, under § 130 of the Decedent's Estate Law. In such case, by § 29 of the Compensation Law, as amended, an insurer who has paid the

awards under § 15, subdivisions 8 and 9, may obtain reimbursement in an action against the alleged wrong-doer, in which action, however, the latter is at liberty to contest both his own liability in the negligence action and the validity of the awards as against the insurer. *Held:*

1. That in subjecting one who has made restitution under the wrongful death statute to this added liability of indemnifying the employer's insurer for payments to the special funds, § 29 does not violate the due process clause of the Fourteenth Amendment. P. 106 *et seq.*

2. A State does not exhaust its power to compel redress for a wrongful death by providing for recovery of the loss sustained by the dependents or next of kin of the decedent; it may exact penalties in addition. P. 106.

3. The mode in which penalties shall be enforced and the disposition of the amounts collected are matters of legislative discretion. P. 107.

4. In this instance, there is no reason why the State may not penalize the wrong-doer by compelling him to indemnify the employer and his insurance carrier for payments properly required of them and made to the State, the liability for such payments having arisen from the wrongful act. P. 107.

5. Inasmuch as the provisions for the creation and application of the special funds, and for requiring the payments by employers and their insurance carriers to maintain them, have been sustained as an appropriate and constitutional part of the plan of the Workmen's Compensation Law, (*Sheehan Co.* v. *Shuler*, 265 U. S. 371,) an insurer thus compelled to pay because of a death caused by wrongful act is not a stranger to that act and his indemnification by the wrong-doer is a natural and reasonable requirement in consequence of that act. P. 107.

6. Section 29 does not deny equal protection of the laws, since it operates uniformly against all wrongdoers in like circumstances, i. e., whenever awards, as required by § 15, subdivisions 8 and 9, have been made against the employer, or his insurer, and have been paid to the state treasurer. P. 108.

251 N. Y. 127, affirmed.

APPEAL from a judgment of the Supreme Court of New York, entered on remittitur from the Court of Appeals. The case was an action by the Indemnity Company under § 29 of the Workmen's Compensation Law, begun in

the Supreme Court by the filing of an agreed statement of facts, and submitted to the Appellate Division of that Court. The judgment of the Appellate Division, 244 App. Div. 346, was in favor of the plaintiff and was affirmed by the Court of Appeals.

Mr. Frederick H. Wood for appellant.

This case presents none of those considerations by reason of which the workmen's compensation laws have been sustained; and the particular provision under review may be sustained, if at all, only as an exercise of the power of the State to create a new cause of action for a penalty or damages for causing death by negligence.

The provision under review is neither an integral nor an essential part of the Workmen's Compensation Law, nor has it any relation to its objects and purposes.

It derives no aid from the considerations by reason of which the validity of workmen's compensation laws have been sustained. On the contrary, such considerations are persuasive that such provision is invalid. *N. Y. Central R. Co.* v. *White*, 243 U. S. 188; *Arizona Employers' Liability Cases*, 250 U. S. 400. *Sheehan Company* v. *Shuler*, 265 U. S. 371, and *N. Y. State Railways* v. *Shuler*, 265 U. S. 379, were decided on the authority of *Mountain Timber Company* v. *Washington*, 243 U. S. 219, in which employers' contributions to such funds were sustained as being in the nature of "occupation taxes." It will scarcely be contended that indemnification of the insurance company is in the nature of an occupation tax for those in the business of wrongfully killing others, or for the privilege of continuing such occupation.

The provision in question constitutes a mere arbitrary exaction, whereby the property of one person is taken for a purely private purpose for the benefit of another, to whom the party liable is a complete stranger and towards whom it has committed no breach of duty.

As an attempted exercise of legislative power to create new causes of action, the provision violates both the due process and equal protection clauses of the Fourteenth Amendment.

Conceivably a State, in the exercise of its power to establish offenses and prescribe punishment therefor, could declare any person wrongfully causing the death of another to be guilty of a misdemeanor and subject to fine, to be paid to the State, in addition to being responsible civilly to the deceased's next of kin. This, however, is not such a statute, nor is it conceivable that the legislature could create such a penalty to accrue to a complete stranger, against whom the wrongdoer committed no breach of duty.

In *Pizitz Company* v. *Yeldell*, 274 U. S. 112, the punitive damages were recoverable by the personal representative of the deceased, not by a stranger. Furthermore in the present case, as pointed out in the dissenting opinion, the payments required to be made into the special funds are in no true sense damages.

These occupation taxes could not have been imposed upon the third party wrongdoer in the first instance. Whether, in lieu thereof, the State could have provided for the creation of special funds through the exaction of a penalty accruing to the State in all cases of wrongful death of a person entitled to the benefits of the Workmen's Compensation Law, it is unnecessary to consider. The provision under review is not of this nature, and such a provision, if valid, would obviously have to be sustained on some ground other than the levy of an occupation or industrial tax.

It would also appear to be clear that these payments, being exacted as an occupation or industrial tax (the theory on which they were sustained by this Court), cannot consistently therewith be shifted by law to the third party wrongdoer as damages caused by him. No person

may be said to suffer damage by reason of the payment of a lawful tax, whatever its nature, or upon whatever contingency its payment may be conditioned.

The particular employers against whom such occupation taxes were levied, in addition to being the beneficiaries of the general scheme under which in common with all others they were relieved of the payment of all additional compensation to be paid under subsections 8 and 9, were those who, by reason of the absence of surviving dependents, had escaped the payment of any compensation growing out of the death of a person in their employ. It will also be observed that the court found that the amount of such taxes did not exceed the average compensation which would have been otherwise payable and was much less than the maximum compensation for which such employers would otherwise have been liable. The inference is plain that if the payments exacted had exceeded such compensation they would have been held to be arbitrary and unreasonable. But under § 29 they are sought to be shifted to persons who have been relieved of no existing liability and are required to pay them in addition to making full restitution in the shape of compensatory damages.

As for the insurance company, its obligations grew out of its contract of insurance, under which, for a consideration, it insured the employer against all liability accruing under the Workmen's Compensation Law, including the payment of these occupation taxes. Its liability did not grow out of any wrongful act upon the part of the appellant but out of such contract of insurance.

Under the interpretation placed upon the statute by the state court, and as applied to the facts of this case, appellant's wrongful act was not even the proximate cause of the respondent's payments. Under such interpretation, these payments were required to be made, not because the

appellant negligently caused the death of the deceased but because the deceased's widow collected from the appellant a sum in excess of the compensation for which the insurance company would otherwise have been liable. If she had taken her full compensation, or if the amount recovered had been less than such compensation, the respondent would have been required to pay nothing into these special funds.

The provision under review violates the equal protection clause of the Fourteenth Amendment because the classification upon which it depends is arbitrary, capricious and without substantial basis. See *Gulf, C. & S. F. Ry. Co.* v. *Ellis*, 165 U. S. 150.

Mr. Jeremiah F. Connor was on the brief for appellee.

Mr. Chief Justice Hughes delivered the opinion of the Court.

This case was submitted to the state court upon an agreed statement of facts, and presented the question of the validity of a provision of section twenty-nine of the Workmen's Compensation Law of New York under the due process and equal protection clauses of the Fourteenth Amendment.

Joseph Perroth, in the course of his employment by one Anderson, was killed through the negligence of the appellant, The Staten Island Rapid Transit Railway Company. Perroth left surviving him a dependent, his widow. The administratrix of Perroth brought an action against the appellant to recover damages caused by his death, and the claim was settled by the payment of an amount in excess of that which the dependent would have been entitled to receive under the Workmen's Compensation Law. In these circumstances, there being no right of recovery by the dependent of Perroth against his employer, subdivi-

sions eight and nine of section fifteen of the Workmen's Compensation Law became applicable.[1]

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[1] Subdivisions eight and nine of section fifteen, as they stood at the time of Perroth's death, were as follows:

§ 15. Schedule in Case of Disability. The following schedule of compensation is hereby established:

. . . .

"8. Permanent total disability after permanent partial disability. If an employee who has previously incurred permanent partial disability through the loss of one hand, one arm, one foot, one leg, or one eye, incurs permanent total disability through the loss of another member or organ, he shall be paid, in addition to the compensation for permanent partial disability provided in this section and after the cessation of the payments for the prescribed period of weeks special additional compensation for the remainder of his life to the amount of sixty-six and two-thirds per centum of the average weekly wage earned by him at the time the total permanent disability was incurred. Such additional compensation shall be paid out of a special fund created for such purpose in the following manner: The insurance carrier shall pay to the state treasurer for every case of injury causing death in which there are no persons entitled to compensation the sum of five hundred dollars. The state treasurer shall be the custodian of this special fund, and the commissioner shall direct the distribution thereof.

"9. Expenses for rehabilitating injured employees. An employee, who as a result of injury is or may be expected to be totally or partially incapacitated for a remunerative occupation and who, under the direction of the state department of education is being rendered fit, to engage in a remunerative occupation, shall receive additional compensation necessary for his rehabilitation, not more than ten dollars per week of which shall be expended for maintenance. Such expense and such of the administrative expenses of the state department of education as are properly assignable to the expense of rehabilitating employees entitled to compensation as a result of injuries under this chapter, shall be paid out of a special fund created in the following manner: The employer, or if insured, his insurance carrier, shall pay into the vocational rehabilitation fund for every case of injury causing death, in which there are no persons entitled to compensation, the sum of five hundred dollars. The state treasurer shall be the custodian of this special fund. . . ."

The scheme of these provisions was the creation of two special funds in the hands of the state treasurer, the one to be used in paying additional compensation to employees incurring permanent total disability after permanent partial disability; and the other, in the vocational education of employees so injured as to need rehabilitation. These special funds were to be maintained by payments by the insurance carrier, as defined in the act,[2] of five hundred dollars for each of the two funds in those cases of injury causing death where there were no persons entitled to compensation under the act, and the payments made out of these special funds for the benefit of employees of the described classes were to be over and above the compensation which the act required to be made by the respective employers of such employees.

In the present instance, the respondent, as the insurer of Perroth's employer, paid to the state treasurer the amount of two awards, of five hundred dollars each, made jointly against Perroth's employer and the respondent under subdivisions eight and nine of section fifteen. The respondent then brought this suit under section twenty-nine of the Workmen's Compensation Law to recover this amount from the appellant which had wrongfully caused the death. That section provides:

"In case of the payment of an award to the state treasurer in accordance with subdivisions eight and nine of section fifteen such payment shall operate to give to the employer or insurance carrier liable for the award a cause of action for the amount of such payment together with the reasonable funeral expenses and the expense of medi-

[2] The definition is as follows: "'Insurance carrier' shall include the state fund, stock corporations or mutual associations with which employers have insured, and employers permitted to pay compensation directly . . ."

cal treatment which shall be in addition to any cause of action by the legal representatives of the deceased."

Two questions were submitted to the state court:

"First. Was the state treasurer entitled to the awards made in his favor and paid by the plaintiff?

"Second. If the first question is answered in the affirmative, is the plaintiff entitled to recover the amount of said awards from the defendant by reason of section twenty-nine of the Workmen's Compensation Law?"

The Appellate Division of the Supreme Court of the State answered both questions in the affirmative, and the judgment entered accordingly for the respondent was affirmed by the Court of Appeals. That court decided that the provision of section twenty-nine which was held to justify the recovery did not violate the Fourteenth Amendment as denying either due process of law or the equal protection of the laws.

The due process clause is invoked on the ground that there is no reasonable basis for the creation of a cause of action against the appellant, and that the statute arbitrarily takes the property of one person for the private use and benefit of another. It is recognized that the State may create new rights and duties and provide for their appropriate enforcement. Recovery for an injury causing death and employers' liability and workmen's compensation acts are familiar illustrations. But it is argued that the appellant committed no wrong against the respondent, and that for the wrong against the deceased and his widow the appellant has made full restitution. The fact of this restitution, however, is an inadequate basis for the conclusion sought. It can not be said that in providing for the recovery of the loss sustained by the dependents or next of kin of a deceased, the State has exhausted its authority to provide redress for the wrong.

The State may permit the recovery of punitive damages in an action by the representatives of the deceased in order to strike effectively at the evil to be prevented. *Pizitz* v. *Yeldell,* 274 U. S. 112, 116. The State might also, if it saw fit, provide for a recovery by the employer for the loss sustained by him by reason of the wrongful act. The wrong may also be regarded as one against the State itself, in depriving the State of the benefit of the life of one owing it allegiance. For this wrong the State might impose a penalty. This is not contested. And it is well settled that the mode in which penalties shall be enforced, and the disposition of the amounts collected are matters of legislative discretion. *Missouri Pacific Railway Company* v. *Humes,* 115 U. S. 512, 523.

But it is said that the legislature can not cause a liability to accrue to a stranger against whom the wrongdoer committed no breach of duty. If, however, the State might penalize the wrongdoer by requiring a payment to be made by him directly to the state treasury, there would seem to be no reason why the State can not compel the wrongdoer to indemnify the employer, and his insurance carrier, for payments properly required of them and made to the State where the liability for such payments has arisen by reason of the death caused by the wrongful act. The State in this instance could have imposed a penalty on the wrongdoer and turned the amount over to the employer or his insurer for their indemnity. It could accomplish the same purpose without circumlocution.

There is no question here as to the validity of the provisions for the creation of the special funds in the hands of the state treasurer, in order to provide additional compensation to employees in cases requiring special consideration, or as to the validity of the requirement of payment by employers and their insurance carriers in order to maintain such funds. The constitutionality of these statutory

provisions has been sustained by this Court. *R. E. Sheehan Co.* v. *Shuler*, 265 U. S. 371; *New York State Railways* v. *Shuler*, 265 U. S. 379. These provisions were an appropriate part of the plan of the Workmen's Compensation Law. It was not considered that the due process clause was violated because the additional compensation, to be made in the described classes of cases, was not paid to the injured employees by their immediate employers or because payment was to be made out of public funds established for the purpose. *R. E. Sheehan Co.* v. *Shuler, supra.* Thus, the respondent is in no proper sense a stranger to the wrongful act of the appellant. The respondent under the law of the State insured the employer of the deceased, and, as insurer, was required by the statute to make the payments in question to the state treasury. As these payments became obligatory because of the death caused by appellant's wrongful act, the indemnification of the respondent was a natural and reasonable requirement in consequence of that act. In creating the cause of action in order to obtain this indemnification, there was no lack of due process of law, as there was none in the means afforded by the State for enforcing the liability. In the action to enforce it the appellant could, as the state court has held in the present case, "avail itself of any defense which it has or ever had. It has a right to establish, if it can, that there could have been no recovery in the negligence action which it settled, and may test the validity of the awards against the insurance carrier by any defense which the carrier could have interposed, as it was not a party to that proceeding and is not bound thereby".

Nor do we find any sufficient ground for the contention that the statutory provisions in question denied the equal protection of the laws. The classification is attacked as arbitrary because it is said to rest on the circumstance

whether or not there are persons entitled to compensation under the statute in the particular case, and that this depends on the further circumstance whether there are dependents and, if there are, whether they recover at least as much as the compensation for which the act provides. But this is the classification with respect to the requirement of the payments by the employer or his insurer for the maintenance of the special funds. That can not be said to be an unreasonable classification, as it provides for those cases where there are no persons entitled to compensation under the act, and thus the immediate employer and his insurer are relieved of the obligation to pay compensation. And, in view of the decisions of this Court, above cited, the validity of subdivisions eight and nine of section fifteen of the statute, as construed by the state court, requiring the payments by the employer and the insured in this instance, have not been questioned. So far as the provision of section twenty-nine is concerned, it operates uniformly against all wrongdoers in like circumstances, that is, whenever awards as required by subdivisions eight and nine of section fifteen have been made against the employer, or his insurer, and such awards have been paid to the state treasurer.

Judgment affirmed.

OKLAHOMA v. TEXAS; UNITED STATES, INTERVENER.

No. 6, Original. Report submitted October 14, 1929.—Decree entered March 17, 1930.

Final decree confirming report of the Commissioner heretofore designated to run, locate and mark the boundary between Oklahoma and Texas along the 100th meridian; establishing the boundary as set forth in the report and accompanying maps; discharging the Commissioner; and directing the Clerk to send to the Chief Magistrates

of those States and to the Secretary of the Interior copies of the decree, report and maps, retaining certain copies for future needs in his office.

Earlier proceedings in this case are reported in 272 U. S. 21, 273 U. S. 93 and 276 U. S. 596.

PER CURIAM.

On consideration of the report dated July 15, 1929, of Samuel S. Gannett, Commissioner, heretofore designated to run, locate and mark the boundary between the State of Oklahoma and the State of Texas along the true 100th meridian of longitude west from Greenwich as determined by the decree of January 3, 1927 (273 U. S. 93), modified by the decree of March 5, 1928 (276 U. S. 596), showing that he has run, located and marked such boundary;

And no objection or exception to such report being presented, and the time therefor having expired;

It is now adjudged, ordered and decreed as follows:

1. The said report is in all things confirmed.

2. The boundary line delineated and set forth in said report and on the accompanying maps is established and declared to be the true boundary between the States of Texas and Oklahoma along said meridian.

3. The clerk of this Court shall transmit to the Chief Magistrates of the States of Texas and Oklahoma and the Secretary of the Interior copies of this decree, duly authenticated under the seal of this Court, together with copies of said report and of the accompanying maps.

4. As it appears that the said Commissioner has completed his work conformably to said decrees, he is hereby discharged.

5. The clerk of this Court shall distribute and deliver to the Chief Magistrates of the States of Texas and Oklahoma and the Secretary of the Interior all copies of the said report made by the Commissioner, with the accom-

panying maps, now in the clerk's hands, save that he shall retain twenty copies of each for purposes of certification and other needs that may arise in his office.

LUCAS, COMMISSIONER OF INTERNAL REVENUE, *v.* EARL.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 99. Argued March 3, 1930.—Decided March 17, 1930.

Under the Revenue Act of 1918, which taxes the income of every individual, including "income derived from salaries, wages, or compensation for personal service . . . of whatever kind and in whatever form paid," the income of a husband by way of salary and attorney's fees is taxable to him notwithstanding that by a contract between him and his wife, assumed to be valid in California where they reside, all their several earnings, including salaries and fees, are to be received, held and owned by both as joint tenants. P. 113.

30 F. (2d) 898, reversed.

CERTIORARI, 280 U. S. 538, to review a judgment of the Circuit Court of Appeals which reversed a decision of the Board of Tax Appeals upholding a tax upon the respondent's income.

Solicitor General Hughes, with whom *Assistant Attorney General Youngquist* and *Messrs. Millar E. McGilchrist, Claude R. Branch, Sewall Key* and *J. Louis Monarch,* Special Assistants to the Attorney General, were on the brief, for petitioner.

Mr. Warren Olney, Jr., with whom *Messrs. J. M. Mannon, Jr., Robert L. Lipman and Henry D. Costigan* were on the brief, for respondent.

The agreement is valid under the law of California. *Wren* v. *Wren,* 100 Cal. 276; *Kaltschmidt* v. *Weber,* 145 Cal. 596; *Perkins* v. *Sunset, etc., Company,* 155 Cal. 712;

Moody v. *Southern Pacific Co.*, 167 Cal. 786; *Cullen* v. *Bisbee*, 68 Cal. 695.

It necessarily follows from the manner in which the agreement operates under the California law that the income of both parties, including the personal earnings of both, is to be taxed as the joint income of both, and not as community property.

The basic principle of the income tax law is that it is a tax on income beneficially received. Applying this principle the income in this case must be taxed as the joint income of the respondent and his wife. *United States* v. *Robbins*, 269 U. S. 315; see *Old Colony Trust Co.* v. *Commissioner*, 279 U. S. 716.

The decisions of the Supreme Court of California hold that such agreements do not operate by way of assignment but by way of establishing the incidents of property. Even if it were true that the agreement operated by way of an equitable assignment and there was at the moment of the receipt of the property an instant of time when the husband held it as exclusively his own, he would so hold it only as a naked trustee. The basic purpose of the income tax law is to tax income beneficially received. Income received as a trustee is taxable as income of the beneficiary. *O'Malley-Keyes* v. *Eaton*, 24 F. (2d) 436; *Young* v. *Guichtel*, 28 F. (2d) 789; *Bowers* v. *New York Trust Co.*, 9 F. (2d) 548.

Under the community property system, in a case where husband and wife agree that the latter's earnings are to be her separate property, the earnings of the wife are to be taxed as part of her income and not as a part of her husband's. *Louis Gassner*, 4 B. T. A. 1071; *E. C. Busche*, 10 B. T. A. 1345; *Francis Krull*, 10 B. T. A. 1096; *Allen Harris*, 10 B. T. A. 1374.

The claim that salaries, wages and compensation for personal services are to be taxed as an entirety and therefore must be returned by the individual who has per-

formed the services which produced the gain, is without support either in the language of the Act or in the decisions of the courts construing it. Not only this, but it is directly opposed to provisions of the Act and to regulations of the Treasury Department which either prescribe or permit that compensation for personal services be not taxed as an entirety and be not returned by the individual performing the services.

It is to be noted that by the language of the Act it is not "salaries, wages or compensation for personal service" that are to be included in gross income. That which is to be included is "gains, profits and income derived" from salaries, wages or compensation for personal service. Salaries, wages or compensation for personal service are not to be taxed as an entirety unless in their entirety they are gains, profits and income. Since, also, it is the gain, profit or income to the individual that is to be taxed, it would seem plain that it is only the amount of such salaries, wages or compensation as is gain, profit or income to the individual, that is, such amount as the individual beneficially receives, for which he is to be taxed.

MR. JUSTICE HOLMES delivered the opinion of the Court.

This case presents the question whether the respondent, Earl, could be taxed for the whole of the salary and attorney's fees earned by him in the years 1920 and 1921, or should be taxed for only a half of them in view of a contract with his wife which we shall mention. The Commissioner of Internal Revenue and the Board of Tax Appeals imposed a tax upon the whole, but their decision was reversed by the Circuit Court of Appeals, 30 F. (2d) 898. A writ of certiorari was granted by this Court.

By the contract, made in 1901, Earl and his wife agreed "that any property either of us now has or may hereafter

acquire . . . in any way, either by earnings (including salaries, fees, etc.), or any rights by contract or otherwise, during the existence of our marriage, or which we or either of us may receive by gift, bequest, devise, or inheritance, and all the proceeds, issues, and profits of any and all such property shall be treated and considered and hereby is declared to be received, held, taken, and owned by us as joint tenants, and not otherwise, with the right of survivorship." The validity of the contract is not questioned, and we assume it to be unquestionable under the law of the State of California, in which the parties lived. Nevertheless we are of opinion that the Commissioner and Board of Tax Appeals were right.

The Revenue Act of 1918 approved February 24, 1919, c. 18, §§210, 211, 212 (a), 213 (a), 40 Stat. 1057, 1062, 1064, 1065, imposes a tax upon the net income of every individual including "income derived from salaries, wages, or compensation for personal service . . . of whatever kind and in whatever form paid," § 213 (a). The provisions of the Revenue Act of 1921, c. 136, 42 Stat. 227, in sections bearing the same numbers are similar to those of the above. A very forcible argument is presented to the effect that the statute seeks to tax only income beneficially received, and that taking the question more technically the salary and fees became the joint property of Earl and his wife or the very first instant on which they were received. We well might hesitate upon the latter proposition, because however the matter might stand between husband and wife he was the only party to the contracts by which the salary and fees were earned, and it is somewhat hard to say that the last step in the performance of those contracts could be taken by anyone but himself alone. But this case is not to be decided by attenuated subtleties. It turns on the import and reasonable construction of the taxing act. There is no doubt that the statute could tax salaries to those who earned them and

provide that the tax could not be escaped by anticipatory arrangements and contracts however skilfully devised to prevent the salary when paid from vesting even for a second in the man who earned it. That seems to us the import of the statute before us and we think that no distinction can be taken according to the motives leading to the arrangement by which the fruits are attributed to a different tree from that on which they grew.

Judgment reversed.

The CHIEF JUSTICE took no part in this case.

LUCAS, COMMISSIONER OF INTERNAL REVENUE, *v.* OX FIBRE BRUSH COMPANY.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

No. 250. Argued February 28, 1930.—Decided April 14, 1930.

1. Reasonable compensation allowed by the board of directors of a corporation to its officers in addition to their salaries, for valuable services rendered by them to the corporation, *held* deductible in computing the net income of the corporation, under § 234 (a) (1) of the Revenue Act of 1918, which permits deduction of "All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including a reasonable allowance for salaries or other compensation for personal services actually rendered." P. 117.
2. Such additional compensation, though made for services rendered in previous years, is deductible from the income of the taxable year in which it was allowed and paid if there was no prior agreement or legal obligation to pay it. P. 119.
3. Section 212 (b) of the Revenue Act of 1918, which provides that the net income shall be computed upon the basis of the taxpayer's accounting period in accordance with the method of accounting regularly employed in keeping the taxpayer's books, but that if such method does not clearly reflect the income, the computation shall be made upon such basis and in such manner as in the opinion of the Commissioner does clearly reflect the income, does not justify

the Commissioner in allocating to previous years a reasonable allowance as compensation for services actually rendered, when the compensation was properly paid during the taxable year and the obligation to pay was incurred during that year and not previously. P. 119.

32 F. (2d) 42, affirmed.

CERTIORARI, 280 U. S. 541, to review a judgment of the Circuit Court of Appeals which reversed a decision of the Board of Tax Appeals sustaining a determination of a deficiency in the income tax of the respondent corporation.

Assistant Attorney General Youngquist, with whom *Messrs. J. Louis Monarch* and *Morton Poe Fisher,* Special Assistants to the Attorney General, *Clarence M. Charest,* General Counsel, Bureau of Internal Revenue, and *John MacC. Hudson,* Special Attorney, Bureau of Internal Revenue, were on the brief, for petitioner.

Mr. Harry B. Sutter, with whom *Messrs. Albert L. Hopkins, Edward H. McDermott,* and *O. John Rogge* were on the brief, for respondent.

MR. CHIEF JUSTICE HUGHES delivered the opinion of the Court.

The Ox Fibre Brush Company appealed to the Board of Tax Appeals from the determination by the Commissioner of Internal Revenue of a deficiency in the income tax of the corporation for the year 1920. The Board of Tax Appeals sustained the ruling of the Commissioner (8 B. T. A. 422), and this decision was reversed by the Circuit Court of Appeals. 32 F. (2d) 42.

The question relates to extra compensation granted by the directors of the corporation in the year 1920 to the president and treasurer, of $24,000 each. In the income tax return for that year, the corporation deducted these items from the gross income and the Commissioner of

Internal Revenue disallowed the deduction. The Board of Tax Appeals held that, if the additional compensation was given for services performed in prior years, it was not deductible in the year 1920; and if, as the Board concluded, it was allowed for services rendered in 1920, it was in excess of reasonable compensation for that year and hence could not be deducted.

The Circuit Court of Appeals found that the conclusion of the Board of Tax Appeals that the additional compensation was allowed for services performed in the year 1920 was without evidence to support it; that the compensation was for past services. It was further decided that the amount of the additional payment was reasonable in the circumstances shown and was deductible in the return for 1920, the year in which it was allowed and paid.

From the facts as found by the Circuit Court of Appeals, it appears that the president of the corporation had been in office from 1906 and its treasurer from 1907. Both of these officers had devoted their entire time to the interests of the corporation. Each year they had personally guaranteed bank loans to the corporation of considerable amounts. In addition to their ordinary executive duties, the president and treasurer had charge of all large purchases, of all sales, and had directed the general policies of the corporation. Prior to their administration, the business of the corporation had been in a chaotic state and had been conducted at a loss, but under their management the gross sales had increased from about $374,000 in 1909 to $1,273,000 in 1920. The net results were changed from an operating loss of about $4,000 in 1908 to net earnings (after deduction of salaries, including the amounts here in question) of about $158,000 in 1920. No dividends were paid until 1910, but dividends were increased from $4,500 in 1911 and 1912 to $423,275 in

1920, represented by a fifty per cent. stock dividend of $300,000 and cash dividends aggregating $123,275, or 25.98 per cent. on the outstanding capitalization at the beginning of that year. The net income in 1920, after a deduction of all expenses, including officers' salaries, represented a return of 21.13 per cent. on invested capital of about $750,000, as determined by the Commissioner of Internal Revenue. The corporation had advanced to a leading place in the brush trade. In 1919 and 1920, the president and treasurer had received salaries of $12,000 and $15,000, respectively. In 1918 their combined salaries were approximately $25,000. The record does not disclose what they received in 1915, 1916 and 1917, but in 1914 they together received $16,000; in 1913, $11,000; in the three preceding years, $10,000, and before that time they received $6,000.

On May 6, 1920, the board of directors unanimously voted to pay to each of these officers $24,000, the resolution in each case explicitly stating that it was paid "as extra compensation for his past services to this company as an officer thereof and in any other capacity."

The books of the corporation were kept on an accrual basis, and during May, 1920, proper entry was made crediting the accounts of the president and treasurer with the additional compensation thus voted.

It is unnecessary to review the facts more in detail, as the Government, adopting the view that the additional compensation, as stated in the resolution of the board of directors and as found by the Circuit Court of Appeals, was for services performed in prior years, concedes on behalf of the Commissioner that the payments were reasonable for such services. The sole question, therefore, which the Government presents is whether these payments were properly deductible in the return for the year 1920.

The statute applicable to the return is the Revenue Act of 1918, c. 18, 40 Stat. 1057. Section 234 (a) of that act provides (*id.* p. 1077):

"Sec. 234. (a) That in computing the net income of a corporation subject to the tax imposed by section 230 there shall be allowed as deductions:

"(1) All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including a reasonable allowance for salaries or other compensation for personal services actually rendered, . . ."

The payments in the present instance were actually made in the year 1920. The expenses represented by these payments were incurred in that year, for it is undisputed that there was no prior agreement or legal obligation to pay the additional compensation. This compensation for past services, it being admitted that it was reasonable in amount in view of the large benefits which the corporation had received as the fruits of these services, the corporation had a right to pay, if it saw fit. There is no suggestion of attempted evasion or abuse. The payments were made as a matter of internal policy having appropriate regard to the advantage of recognition of skill and fidelity as a stimulus to continued effort. There was nothing in the income tax law to preclude such action. On the contrary, the payments fell directly within the provision of section 234(a) as a reasonable allowance for compensation for personal services actually rendered. The statute does not require that the services should be actually rendered during the taxable year, but that the payments therefor shall be proper expenses paid or incurred during the taxable year.

It is urged that under Section 212 (b) of the Revenue Act of 1918 (*id.* 1064, 1065) the Commissioner was entitled to disallow the deduction in the return for 1920,

upon the ground that if it were allowed the return would not clearly reflect the income for that year. It is said that the basic principle to be applied is that the true net income is to be taxed. Section 212 (b) provides:

"(b) The net income shall be computed upon the basis of the taxpayer's annual accounting period (fiscal year or calendar year, as the case may be) in accordance with the method of accounting regularly employed in keeping the books of such taxpayer; but if no such method of accounting has been so employed, or if the method employed does not clearly reflect the income, the computation shall be made upon such basis and in such manner as in the opinion of the Commissioner does clearly reflect the income. . . ."

This section relates to the method of accounting; the Commissioner may make the computation on a basis that does clearly reflect the income, if the method employed by the taxpayer does not. But this section does not justify the Commissioner in allocating to previous years a reasonable allowance as compensation for services actually rendered, when the compensation was properly paid during the taxable year and the obligation to pay was incurred during that year and not previously. In the present instance, the expense could not be attributed to earlier years, for it was neither paid nor incurred in those years. There was no earlier accrual of liability. It was deductible in the year 1920 or not at all. Being deductible as a reasonable payment, there was no authority vested in the Commissioner to disregard the actual transaction and to readjust the income on another basis which did not respond to the facts.

The case of *United States* v. *Anderson,* 269 U. S. 422, is not in point, as there the liability for the munitions tax at a fixed rate had accrued in the earlier year (1916) and was a charge on the business of that year, although the precise amount was ascertained and was payable in 1917. In

American National Company v. *United States,* 274 U. S. 99, there was a contract providing definitely for the payment. Compare *Lucas, as Commissioner of Internal Revenue* v. *American Code Company,* 280 U. S. 445.

Judgment affirmed.

THE HENRIETTA MILLS *v.* RUTHERFORD COUNTY, NORTH CAROLINA, ET AL.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

No. 270. Argued March 5, 1930.—Decided April 14, 1930.

1. A suit to enjoin the collection of a state tax, as violative of the Fourteenth Amendment, upon the ground that the taxing officials, in making the assessment, arbitrarily and intentionally valued the plaintiff's property much above its true value, while assessing all other property in the county at only 60% of true value, will not lie in the federal court if the plaintiff has a plain, adequate and complete remedy at law. Jud. Code § 267; U. S. C., Title 28, § 384. P. 123.
2. It must appear that the enforcement of the tax would cause irreparable injury, or that there are other special circumstances bringing the case under some recognized head of equity jurisdiction, before the aid of a federal court of equity can be invoked. P. 124.
3. The mere fact that the validity of the tax may be tested more conveniently by a bill in equity than by an action at law does not justify resort to the former. *Id.*
4. In this case, under § 7979, Consolidated Statutes of North Carolina, the taxpayer had an adequate remedy at law by first paying the tax and then suing to recover it. P. 125.
5. The Act of Congress cited *supra* has reference to the adequacy of the remedy on the law side of the federal courts. P. 126.
6. The enforcement in the federal courts of new equitable rights created by States is subject to the qualification that such enforcement must not impair any right conferred, or conflict with any inhibition imposed, by the Constitution or laws of the United States. P. 127.
7. A state statute conferring a merely remedial right to enjoin collection of invalid taxes can not enlarge the right to proceed in a

federal court sitting in equity, and the federal court may, therefore, be obliged to deny an equitable remedy which the plaintiff might have had in a state court. P. 127.

8. The Act of Congress, *supra*, though it does not extend to the jurisdiction of the federal court, governs the proceedings in equity and, unless the case is one where the objection may be treated as waived by the party entitled to raise it, the prohibition is not to be disregarded. P. 128.

32 F. (2d) 570, affirmed.

CERTIORARI, 280 U. S. 541, to review a decree of the Circuit Court of Appeals which affirmed a decree of the District Court dismissing a bill to enjoin the collection of a state tax.

Mr. Willis Smith, with whom *Messrs. Murray Allen* and *W. T. Joyner* were on the brief, for petitioner.

Mr. Clyde R. Hoey, with whom *Messrs. Fred D. Hamrick, N. C. Harris*, and *J. S. Dockery* were on the brief, for respondents.

MR. CHIEF JUSTICE HUGHES delivered the opinion of the Court.

The Henrietta Mills, a corporation of North Carolina, brought this suit in the District Court of the United States to enjoin Rutherford County, in that State, from collecting a tax upon the property of the corporation for the year 1927, or for any subsequent year, based upon any valuation in excess of sixty per cent. of the actual and fair market value. It was alleged that the enforcement of such a tax would deprive the corporation of its property without due process of law and deny the equal protection of the laws in violation of the Fourteenth Amendment of the Federal Constitution.

The bill of complaint charged that the actual value, in the sense of the applicable statutory provision of the State, of the property of the corporation in Rutherford

County on May 1, 1927, did not exceed $1,887,352, but that the property was actually assessed at $2,637,819. The corporation complained to the County Commissioners, as the constituted Board of Equalization and Review, but the board declined to pass upon the questions presented. The corporation then appealed to the State Board of Assessment which, after hearing, reduced the assessment by the sum of $275,000 and fixed the value of the property at $2,362,819. The bill alleged that the tax officials of the county, and of the State, had intentionally and arbitrarily valued the complainant's property greatly in excess of its true value, while at the same time they had fixed the value of all other assessable property within the county at only sixty per cent. of its true value; that the assessment of complainant's property should have been reduced in like proportion, that is, to $1,132,411.20; and that the complainant had paid to the county a sum which would be equal to the tax if laid upon such a valuation.

The answer denied that there had been any arbitrary and intentional overvaluation, or any unlawful discrimination against the complainant, and alleged that the complainant had an adequate remedy at law.

The District Court decided against the complainant upon both these grounds and dismissed the bill of complaint. The decree was affirmed by the Circuit Court of Appeals. 32 F. (2d) 570.

Section 16 of the Judiciary Act of 1789 (1 Stat. 82) provided "That suits in equity shall not be sustained in either of the courts of the United States, in any case where a plain, adequate and complete remedy may be had at law." This explicit prohibition, continued in section 723 of the Revised Statutes and section 267 of the Judicial Code (U. S. C., Tit. 28, sec. 384), has clear application to proceedings to enjoin the collection of taxes upon the ground that they are illegal or unconstitutional. It must

appear that the enforcement of the tax would cause irreparable injury, or that there are other special circumstances bringing the case under some recognized head of equity jurisdiction, before the aid of a Federal court of equity can be invoked. The mere fact that the validity of the tax may be tested more conveniently by a bill in equity than by an action at law does not justify resort to the former.[1]

In the present case, a distinction is sought to be taken upon the ground that a statute of North Carolina gives a right to proceed in equity, and it is argued that a similar right should be recognized by the Federal court. Section 7979 of the Consolidated Statutes of North Carolina provides:

"Unless a tax or assessment, or some part thereof, be illegal or invalid, or be levied or assessed for an illegal or unauthorized purpose, no injunction shall be granted by any court or judge to restrain the collection thereof in whole or in part, nor to restrain the sale of any property for the non payment thereof; nor shall any court issue any order in claim and delivery proceedings or otherwise for the taking of any personalty levied on by the sheriff to enforce payment of such tax or assessment against the

[1] *Dows* v. *City of Chicago*, 11 Wall. 108, 112; *Union Pacific Railway Company* v. *Cheyenne*, 113 U. S. 516, 525; *Shelton* v. *Platt*, 139 U. S. 591, 594; *Pittsburgh, etc., Railway* v. *Board of Public Works*, 172 U. S. 32, 37; *Arkansas Building and Loan Association* v. *Madden*, 175 U. S. 269, 274; *Cruickshank* v. *Bidwell*, 176 U. S. 73, 80, 81; *Indiana Manufacturing Company* v. *Koehne*, 188 U. S. 681, 684; *Boise Artesian Water Company* v. *Boise City*, 213 U. S. 276, 281, 282; *Singer Sewing Machine Company* v. *Benedict*, 229 U. S. 481, 485; *Dalton Adding Machine Company* v. *State Corporation Commission*, 236 U. S. 699, 701; *Union Pacific Railroad Company* v. *Weld County*, 247 U. S. 282, 285; *Keokuk Bridge Company* v. *Salm*, 258 U. S. 122, 125; *Risty* v. *Chicago, R. I. & P. Railway Company*, 270 U. S. 378, 388.

owner thereof. Whenever any person shall claim to have a valid defense to the enforcement of a tax or assessment charged or assessed upon his property or poll, such person shall pay such tax or assessment to the sheriff; but if, at the time of such payment, he shall notify the sheriff in writing that he pays the same under protest, such payment shall be without prejudice to any defenses or rights he may have in the premises, and he may, at any time within thirty days after such payment, demand the same in writing from the treasurer of the state or of the county, city, or town, for the benefit or under the authority or by request of which the same was levied; and if the same shall not be refunded within ninety days thereafter, may sue such county, city, or town for the amount so demanded, including in his action against the county both state and county tax; and if upon the trial it shall be determined that such tax or any part thereof was levied or assessed for an illegal or unauthorized purpose, or was for any reason invalid or excessive, judgment shall be rendered therefor, with interest, and the same shall be collected as in other cases. The amount of state taxes for which judgment shall be rendered in such action shall be refunded by the state treasurer." (Laws of 1901, c. 558, § 30.)

The Supreme Court of North Carolina, in *Norfolk-Southern Railroad Company* v. *Board of Commissioners*, 188 N. C. 265, 266, made the following statement as to the procedure in the state courts:

"In this jurisdiction, a taxpayer may contest the validity of an assessment or collection of tax upon his property in one of two ways:

"(1) He may pay the alleged illegal or invalid tax under protest and then bring an action to recover it back, observing, of course, the requirements of the statute with respect to time, notice, etc. C. S. 7979. *Murdock* v.

Comrs., 138 N. C. 124; *Hilliard* v. *Asheville*, 118 N. C. 845; *Schaul* v. *Charlotte*, 118 N. C. 733; *Range Co.* v. *Carver*, 118 N. C. 328.

"(2) He may, if the tax or assessment, or some part thereof, be illegal or invalid, or be levied or assessed for an illegal or unauthorized purpose, apply for injunctive relief without paying the alleged illegal or invalid tax in advance. C. S. 858;[2] *Sherrod* v. *Dawson*, 154 N. C. 525; *Lumber Co.* v. *Smith*, 146 N. C. 199; *Purnell* v. *Page*, 133 N. C. 129."[3]

If it be assumed that, under the state statutes, the complainant could have applied to the state court for an injunction, the complainant also had an adequate remedy at law. *Schaul* v. *Charlotte*, 118 N. C. 733; *Teeter* v. *Wallace*, 138 N. C. 264, 267; *Blackwell* v. *City of Gastonia*, 181 N. C. 378; *Brunswick-Balke-Collender Company* v. *Mecklenburg County*, 181 N. C. 386; *Carstarphen* v. *Plymouth*, 186 N. C. 90. This is not a matter of doubt, as in *Union Pacific Railroad Company* v. *Weld County*, 247 U. S. 282, 285, and *Atlantic Coast Line Railroad Company* v. *Daughton*, 262 U. S. 413, 426. The act of Congress with respect to the existence of such a remedy has reference to the adequacy of the remedy on the law side of the Federal courts (*Smyth* v. *Ames*, 169 U. S. 466, 516; *Chicago, B. & Q. Railroad Company* v. *Osborne*, 265 U. S. 14, 16; *Risty* v. *Chicago, R. I. & P. Railway Com-*

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[2] Section 858 of Consolidated Statutes of North Carolina provides: "No injunction may be granted by any court or judge to restrain the collection of any tax or any part thereof, or to restrain the sale of any property for the non payment of any tax, unless such tax or the part thereof enjoined is levied or assessed for an illegal or unauthorized purpose, or the tax assessment is illegal or invalid."

[3] See also *Bond* v. *Tarboro*, 193 N. C. 248; *Hunt* v. *Cooper*, 194 N. C. 265; *Southern Railway Company* v. *Cherokee County*, 195 N. C. 756.

pany, 270 U. S. 378, 388) and in this case there would have been an adequate remedy at law, not only in the state court, but also in the Federal court if petitioner had been able to show a violation of the Federal Constitution (Judicial Code, sec. 24).

The contention is that the state statute authorizing a proceeding in the state court for an injunction created an equitable right which should be enforced in the Federal court. It is true that where a state statute creates a new equitable right of a substantive character, which can be enforced by proceedings in conformity with the pleadings and practice appropriate to a court of equity, such enforcement may be had in a Federal court provided a ground exists for invoking the Federal jurisdiction. *Clark* v. *Smith,* 13 Pet. 195, 203; *In re Broderick's Will,* 21 Wall. 503, 520; *Holland* v. *Challen,* 110 U. S. 15, 24, 25; *Frost* v. *Spitley,* 121 U. S. 552, 557; *Gormley* v. *Clark,* 134 U. S. 338, 348; *Lawson* v. *United States Mining Company,* 207 U. S. 1, 9; *Pusey & Jones Company* v. *Hanssen,* 261 U. S. 491, 498. But the enforcement in the Federal courts of new equitable rights created by States is subject to the qualification that such enforcement must not impair any right conferred, or conflict with any inhibition imposed, by the Constitution or laws of the United States. This Court said in *Scott* v. *Neely,* 140 U. S. 106, 110, that " whenever, respecting any right violated, a court of law is competent to render a judgment affording a plain, adequate and complete remedy, the party aggrieved must seek his remedy in such court, not only because the defendant has a constitutional right to a trial by jury, but because of the prohibition of the act of Congress to pursue his remedy in such cases in a court of equity." *Whitehead* v. *Shattuck,* 138 U. S. 146, 152; *Wehrman* v. *Conklin,* 155 U. S. 314, 323. Whatever uncertainty may have arisen because of expressions which did not fully accord

with the rule as thus stated,[4] the distinction, with respect to the effect of state legislation, has come to be clearly established between substantive and remedial rights. A state statute of a mere remedial character, such as that which the petitioner invokes, can not enlarge the right to proceed in a Federal court sitting in equity, and the Federal court may, therefore, be obliged to deny an equitable remedy which the plaintiff might have had in a state court. *Pusey & Jones* v. *Hanssen, supra.*

The provision of the act of Congress does not extend to the jurisdiction of the Federal court, but governs the proceedings in equity and, unless the case is one where the objection may be treated as waived by the party entitled to raise it, the prohibition is not to be disregarded. *Reynes* v. *Dumont,* 130 U. S. 354, 395; *Singer Sewing Machine Company* v. *Benedict,* 229 U. S. 481, 484; *American Mills Company* v. *American Surety Company,* 260 U. S. 360, 363. There was no waiver in the present case and, as the petitioner had an adequate remedy at law, the District Court could not properly entertain the suit.

Decree affirmed without prejudice to proceedings at law.

NOGUEIRA *v.* NEW YORK, NEW HAVEN & HARTFORD RAILROAD COMPANY.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 248. Argued February 28, 1930.—Decided April 14, 1930.

N. was injured while employed by a railroad company as one of a gang of freight handlers in loading freight into railroad cars on a car float lying in navigable waters at a pier. The float was a ves-

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[4] See *Cummings* v. *National Bank,* 101 U. S. 153, 157; *Greeley* v. *Lowe,* 155 U. S. 58, 75; *Cowley* v. *Northern Pacific Railroad Company,* 159 U. S. 569, 582; *Grether* v. *Wright,* 75 Fed. 742.

sel of 500 tons belonging to the company and was used in the transportation of such cars. The injury occurred on the float while N. was handling a piece of interstate freight. *Held:*

1. That the car float, being in navigable waters, was subject to the maritime law like any other vessel. P. 134.

2. Since the injury was within the exclusive admiralty and maritime jurisdiction, a recovery for it through workmen's compensation proceedings could not validly be provided by state law. *Southern Pacific Co.* v. *Jensen*, 244 U. S. 205. *Id.*

3. The case is governed by the Longshoremen's and Harbor Workers' Compensation Act, which prescribes exclusively the liability of employers where employees engaged in maritime employment suffer disability or death from injuries occurring upon the navigable waters of the United States and recovery through workmen's compensation proceedings may not validly be provided by state law, and which excepts the master and members of the crew of any vessel and persons engaged by the master to load or unload or repair any vessel under eighteen tons net, but makes no exception of railroad employees engaged in interstate or foreign commerce. Pp. 131, 134, *et seq.*

32 F. (2d) 179, affirmed.

CERTIORARI, 280 U. S. 541, to review a judgment of the Circuit Court of Appeals affirming a judgment dismissing the complaint in an action under the Federal Employers' Liability Act.

Mr. Sol Gelb, with whom *Mr. Humphrey J. Lynch* was on the brief, for petitioner.

Mr. Edward R. Brumley, with whom *Messrs. John M. Gibbons, Fleming James, Jr.*, and *Edmund J. Moore* were on the brief, for respondent.

MR. CHIEF JUSTICE HUGHES delivered the opinion of the Court.

In this action, brought in the District Court of the United States under the Federal Employers' Liability Act, the complaint was dismissed upon the ground that

the Longshoremen's and Harbor Workers' Compensation Act of March 4, 1927, was applicable and afforded an exclusive remedy. (c. 509, 44 Stat. 1424; U. S. C. Tit. 33, secs. 901-950). The judgment was affirmed by the Circuit Court of Appeals, 32 Fed. (2d) 179.

The petitioner was injured on a car float of five hundred tons belonging to the defendant railroad company. The float was a vessel used in the transportation of railroad cars and at the time of the injury was lying in navigable waters at pier 42, East River, New York harbor. The petitioner was employed by the railroad company as one of a gang of freight handlers in loading freight into cars on the float. He was using a hand truck in carrying a bale of paper, a piece of interstate freight, and, as the float was several feet lower than the dock, it was necessary to move the bale over a plank which ran from the dock to the middle of the float at a steep incline. Several men were assigned to help the petitioner in order to control the movement of the bale by handhooks. The petitioner was in front of the truck holding its handles and alleged that by the negligence of the other men, who failed to hold the bale properly, it got out of control and skidded down the plank, throwing the petitioner on the floor of the float and crushing his leg.

The contention is that the car float was used as an adjunct to railroad transportation in interstate commerce, and that it was not the intention of Congress to substitute the remedy under the Longshoremen's and Harbor Workers' Compensation Act for that afforded by the Federal Employers' Liability Act. The Circuit Court of Appeals assumed that the petitioner would have been entitled to prosecute his claim under the Federal Employers' Liability Act if the later act did not apply. If the latter was applicable the remedy thereunder was made exclusive by

the explicit provision of section 5. 44 Stat. p. 1426; U. S. C., Tit. 33, sec. 905.[1]

The general scheme of the Longshoremen's and Harbor Workers' Compensation Act was to provide compensation to employees engaged in maritime employment, except as stated, for disability or death resulting from injury occuring upon the navigable waters of the United States where recovery through workmen's compensation proceedings might not validly be provided by state law. Employers are bound to secure the payment of the prescribed benefits to those of their employees whose employment is covered by the act, and this compensation is to be payable irrespective of fault as a cause of the injury.

Employers are thus defined in section 2, subdivision (4) (44 Stat. 1425, U. S. C. Tit. 33, sec. 902): "The term 'employer' means an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any dry dock.)" The term is not defined otherwise, with respect either to the nature or the scope of

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[1] Section 5 provides: "The liability of an employer prescribed in Section 4 shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this Act, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under this Act, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, nor that the employee assumed the risk of his employment, nor that the injury was due to the contributory negligence of the employee."

the enterprises in which the employer is engaged. The definition is manifestly broad enough to embrace a railroad company, provided it has employees who "are employed in maritime employment, in whole or in part, upon the navigable waters of the United States."

The employees subject to the act are not defined affirmatively, but section 2, subdivision (3) (*id.*) contains the following limitation: "The term 'employee' does not include a master or member of a crew of any vessel, nor any person engaged by the master to load or unload or repair any small vessel under eighteen tons net." In this instance, the petitioner was not the master or member of the crew of the vessel, and the vessel was not under eighteen tons.

The 'coverage' of the act is stated in section 3, subdivision (a) (44 Stat. 1426, U. S. C. Tit. 33, sec. 903):

"Sec. 3. (a) Compensation shall be payable under this Act in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law."

In *Atlantic Transport Company* v. *Imbrovek*, 234 U. S. 52, the libelant was engaged as a stevedore in loading a ship lying in port in navigable waters. The court had no doubt that he was performing a maritime service and that the rights and liabilities of the parties were matters within the admiralty jurisdiction. In *Southern Pacific Company* v. *Jensen*, 244 U. S. 205, the Southern Pacific Company, a common carrier by railroad in interstate commerce, also operated a steamship between New York and Galveston. Jensen, an employee of the company, was killed while he was engaged in unloading the ship which was berthed at a pier in the North River, New

York harbor. He was operating a small electric freight truck which he drove out of the vessel upon a gang plank running to the pier. The Court of Appeals of New York held that the Workmen's Compensation Act of the State applied to his employment and that the statute was not obnoxious to the Federal Constitution. In this Court, two questions were presented, first, whether the Federal Employers' Liability Act was applicable and hence the state statute could not control; and, second, whether the Workmen's Compensation Act of the State conflicted with the general maritime law which constitutes an integral part of the Federal law under Article III, section 2, of the Federal Constitution. Concluding that the case was not within the Federal Employers' Liability Act, as the ship could not properly be regarded as a part of the railroad's extension or equipment, the Court took up the second question and decided that the New York Workmen's Compensation Act could not constitutionally govern the case of one injured upon navigable waters while engaged in maritime service. It was said that the state statute attempted to give a remedy unknown to the common law, incapable of enforcement by the ordinary proceedings of any Court, which was not saved to suitors from the constitutional grant of exclusive jurisdiction to the Federal District Courts.

In *State Industrial Commission* v. *Nordenholt Corporation*, 259 U. S. 263, a longshoreman was injured on a dock while engaged in unloading a vessel. It was decided that in such a case, where the injury took place on an extension of the land, the maritime law did not prescribe the liability and the local law had always governed. The Workmen's Compensation Law of the State was accordingly held to be applicable. The distinction was thus maintained between injuries on land and those which were suffered by persons engaged in maritime employment on a vessel in navigable waters.

From the standpoint of maritime employment, it obviously makes no difference whether the freight is placed in the hold or on the deck of a vessel, or whether the vessel is a car float or a steamship. A car float in navigable waters is subject to the maritime law like any other vessel. The injury caused to petitioner in this case is thus as much within the exclusive admiralty and maritime jurisdiction as was that of the employee in *Southern Pacific Company* v. *Jensen, supra,* and recovery for the injury "through workmen's compensation proceedings" could not "validly be provided by state law."

As the present case falls directly within the affirmative provisions of section 3 of the Longshoremen's and Harbor Workers' Compensation Act, we look next to the cases specially excepted. Section 3, after the provision quoted above, continues:

"No compensation shall be payable in respect of the disability or death of—

"(1) A master or member of a crew of any vessel, nor any person engaged by the master to load or unload or repair any small vessel under eighteen tons net; or

"(2) An officer or employee of the United States or any agency thereof, or of any State or foreign government, or of any political subdivision thereof."

The case of the petitioner does not come within any of these exceptions. Their limited character is significant. No exception is made of the employees of a railroad company employed in maritime service on the navigable waters of the United States or with respect to the question whether such employment was in connection with an extension of railroad transportation. As to the master and crew of a vessel, it should be noted that section 33 of the Merchant Marine Act, 1920 (c. 250, 41 Stat. 988, 1007), gave to seamen the rights and remedies under all statutes of the United States which were applicable to railway employees in cases of personal injury, thus carry-

ing to seamen the benefit of the provisions of the Federal Employers' Liability Act. *Panama Railroad Company* v. *Johnson,* 264 U. S. 375; *Engel* v. *Davenport,* 271 U. S. 33. Longshoremen engaged on a vessel at dock in navigable waters, in the work of loading or unloading, have been held to be seamen. *International Stevedoring Company* v. *Haverty,* 272 U. S. 50; *Northern Coal Company* v. *Strand,* 278 U. S. 142. But seamen, including longshoremen engaged in loading or unloading, if injured on a vessel in navigable waters, could not constitutionally have the benefit of a state workmen's compensation act, even if an act of Congress so provided. After the decision in *Southern Pacific Company* v. *Jensen, supra,* Congress amended clause three of section 24 and clause three of section 256 of the Judicial Code relating to cases of admiralty and maritime jurisdiction, by adding to the clause saving to suitors common law remedies the words "and to claimants the rights and remedies under the workmen's compensation law of any State" (Act of October 6, 1917, c. 97, 40 Stat. 395). In *Knickerbocker Ice Company* v. *Stewart,* 253 U. S. 149, this Court held that the attempted amendment was unconstitutional as being an unwarranted delegation of the legislative power of Congress and as destroying the uniformity which the Constitution had established and thus defeating the constitutional grant of jurisdiction to the Federal Courts. By the Act of June 10, 1922 (c. 216, 42 Stat. 634), Congress again amended clause three of section 24 and clause three of section 256 of the Judicial Code. There was added to the saving clause the words "and to claimants for compensation for injuries to or death of persons other than the master or members of the crew of a vessel their rights and remedies under the workmen's compensation law of any State, District, Territory, or possession of the United States, which rights and remedies when conferred by such law shall be exclusive." This Court decided that the ex-

ception of the master and crew of a vessel was insufficient to meet the objections which had been pointed out and the amendment was held to be unconstitutional. *Washington* v. *Dawson & Company*, 264 U. S. 219.

When the bill which became the Longshoremen's and Harbor Workers' Compensation Act was pending in Congress, the importance of the policy of compensation acts, and their advantages in providing for appropriate compensation in the case of injury or death of employees without regard to the fault of the employer, were distinctly recognized. It appears that the bill originally excluded a master or members of a crew of a vessel, but was amended so as to extend to them the benefits of compensation (House Rep. No. 1767, 69th Cong., 2d sess.). As these seamen preferred to remain outside of the provisions of the bill, they were finally excluded and the bill was passed with the exceptions above-quoted. (Cong. Rec., 69th Cong., 2d. sess., vol. 68, pt. 5, p. 5908.) There was no exclusion of stevedores or of those sustaining injuries upon navigable waters in loading or unloading a vessel unless it was under eighteen tons net. The application of the act in such cases was explicitly made to depend upon the question whether the injury occurred upon navigable waters and recovery therefor could not validly be provided by a state compensation statute.

The bill, as reported to, and first passed by, the Senate, contained a provision in section 3 excepting " an employee of a common carrier by railroad engaged in interstate or foreign commerce or in commerce within any Territory or the District of Columbia if the injury from which the disability or death results occurred while the employee was employed in such commerce." (Sen. Rep. No. 973, 69th Cong., 1st sess.) This exception was eliminated from the bill as finally passed.

It is hardly necessary to go further, as the clear and constitutional requirements of the act of Congress in the

furtherance of the policy conceived to be in the interest of employees can not be escaped by any permissible process of construction. For the opposing view it is said that repeals by implication are not favored. But it is not a case of resort to implication. The act expressly provides that liability thereunder " shall be exclusive and in place of all other liability of such employer to the employee, his legal representative . . . at law or in admiralty." It is further provided that if the employer in the case of the described employees engaged in maritime employment does not give the required compensation, the employee or his legal representative can maintain an action at law for damages, and in such an action, not only are the defenses of contributory negligence and the negligence of a fellow servant excluded, but also that of assumption of risk, a defense which is still open under the Federal Employers' Liability Act save in specified cases. *Seaboard Air Line Railway* v. *Horton,* 233 U. S. 492; *Pryor* v. *Williams,* 254 U. S. 43. Not only is the payment of compensation under the act a bar to recovery at law but, if the compensation is not given, the remedy then available at law has its special incidents.

Nor is there anything of substance added to the argument for the petitioner by reference to the possible effect on the application of other laws in cases which come within the purview of the Longshoremen's and Harbor Workers' Compensation Act, for the question still is to what cases does that act apply according to its terms. The fact that the same employee of a railroad company may have different rights at different times is a familiar consequence of the application of different laws, as, for example, when the employee of a railroad company is engaged at one time in intrastate commerce and at another time, even on the same day, in interstate commerce; and the application of Federal laws where the employment falls within the Federal jurisdiction is manifestly

a matter within the discretion of Congress. *Panama Railroad Company* v. *Johnson, supra.* In the present instance, had the petitioner been engaged in intrastate commerce, his case still would have been within the maritime jurisdiction of the Federal courts, and he would have been denied the benefit of the state compensation law. See *London Guarantee & Accident Company* v. *Industrial Accident Commission,* 279 U. S. 109. In these circumstances Congress dealt with the maritime employment of longshoremen whose injuries sustained on navigable waters would fall within the exclusive maritime jurisdiction, without regard to the distinction between intrastate and interstate transportation.

It is also pointed out that in the Act of May 17, 1928 (c. 612, 45 Stat. 600), applying the provisions of the Longshoremen's and Harbor Workers' Compensation Act to employees in the District of Columbia, a special exception was added of the case of an employee of a common carrier by railroad when engaged in interstate or foreign commerce or commerce solely within the District of Columbia. The fact that a similar exception was left out of the Longshoremen's and Harbor Workers' Compensation Act and was inserted in the later statute works against, rather than for, the petitioner's contention.

Judgment affirmed.

UNITED STATES *v.* UNZEUTA.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA.

No. 509. Argued March 12, 1930.—Decided April 14, 1930.

1. When the United States acquires title to lands by purchase with the consent of the legislature of the State within which they are situated "for the erection of forts, magazines, arsenals, dockyards and other needful buildings" (Const., Art. I, § 8,) the federal jurisdiction is exclusive of all state authority. P. 142.

2. But when an area of public lands of the United States is set aside as a military reservation and jurisdiction over it is ceded to the United States by the State, the State may attach to the cession conditions that are not inconsistent with the carrying out of the purpose of the reservation, and the terms of the cession, to the extent that they may be lawfully prescribed, determine the extent of the federal jurisdiction. P. 142.
3. Public land of the United States in the State of Nebraska was reserved by Executive Order as a military reservation. Congress granted to a railroad company a right of way across it to be located subject to the approval of the Secretary of War and not to interfere with any buildings or improvements. The State thereafter ceded to the United States its jurisdiction over the reservation, with a proviso that the jurisdiction ceded should continue no longer than the United States should own and occupy the reservation and reserving to the State jurisdiction to execute civil and criminal process within the reservation and the right to open or repair public roads over it. *Held,* construing the Act of cession,

   (1) That the condition as to execution of process had relation to crimes committed outside of the reservation. P. 143.

   (2) The proviso looked to the future and did not apply to the railroad right of way existing when the cession was made. *Id.*

   (3) The fact that the right of way was actually used by the railroad and under a permanent grant, was not incompatible with the maintenance of the federal jurisdiction over it, since that jurisdiction might be necessary in order to secure the benefits intended to be derived from the reservation. P. 144.

   (4) A murder committed on the right of way, within the reservation, was punishable by the United States. Pp. 140, 146.

35 F. (2d) 750, reversed.

APPEAL from a judgment of the District Court sustaining a plea to the jurisdiction in a prosecution for murder.

Assistant Attorney General Richardson, with whom *Attorney General Mitchell, Assistant Attorney General Luhring,* and *Messrs. Claude R. Branch,* Special Assistant to the Attorney General, and *W. H. Ramsey* were on the brief, for the United States.

The Act of Congress granting the right of way was not intended to affect the sovereignty or control of the United States over the land embraced in the right of way.

The cession by Nebraska constituted a convention and agreement, and the federal jurisdiction rests upon that convention and agreement and is limited accordingly.

The interpretation of the cession by Nebraska and by the War Department with respect to this right of way supports the conclusion that the cession of exclusive jurisdiction covers such right of way.

The Government relied particularly on: *Ft. Leavenworth Ry. Co.* v. *Lowe,* 114 U. S. 525; *Chicago & Pac. Ry. Co.* v. *McGlinn,* 114 U. S. 542; *Benson* v. *United States,* 146 U. S. 325; *Arlington Hotel* v. *Fant,* 278 U. S. 451. And see *People* v. *Hillman,* 246 N. Y. 467; *Baker* v. *State,* 47 Tex. Cr. Rep. 482.

Distinguishing: *Clairmont* v. *United States,* 225 U. S. 551; *Utah & Northern Ry.* v. *Fisher,* 115 U. S. 28.

Mr. Allen G. Fisher submitted for appellee.

Appellee relied partly upon the proposition that the railroad is a post road subject as a highway to the jurisdiction of the State, citing in this and other connections: *Cleveland, etc. R. Co.* v. *Franklin Canal Co.,* 5 Fed. Cas. No. 2890; *Atlantic, etc. Tel. Co.* v. *Chicago, etc. R. Co.,* 2 Fed. Cas. 632; *Houston* v. *Moore,* 5 Wheat. 34; *Utah & Northern Ry.* v. *Fisher,* 116 U. S. 30; *Buck* v. *Kuykendall,* 295 Fed. 197; *Commission* v. *Closson,* 229 Mass. 329.

Distinguishing: *Anderson* v. *Chicago & N. W. R. Co.,* 102 Neb. 578.

Mr. Chief Justice Hughes delivered the opinion of the Court.

The respondent was indicted for murder alleged to have been committed on a freight car on the right of way of the Chicago & Northwestern Railway Company on the Fort Robinson Military Reservation in Nebraska. He filed a plea to the jurisdiction of the United States upon

the ground that the right of way was within the jurisdiction of the State of Nebraska. The District Court sustained the plea (35 F. (2d) 750) and the Government brings the case here under the Criminal Appeals Act (34 Stat. 1246, U. S. C., Tit. 18, sec. 682).

When Nebraska was admitted to the Union, the United States retained all right and title to the unappropriated public lands lying within the territory of Nebraska. Act of April 19, 1864, c. 59, sec. 4, 13 Stat, 47, 48; Act of February 9, 1867, c. 36, sec. 2, 14 Stat. 391, 392. By Executive Order of November 14, 1876, a portion of these lands was reserved for the Fort Robinson Military Reservation. In 1885, Congress granted the right of way in question to the Fremont, Elk Horn & Missouri Valley Railroad Company, a Nebraska corporation, "across and through the Fort Robinson Military Reservation, located in said State of Nebraska, not to interfere with any buildings or improvements thereon, and the location thereof to be subject to the approval of the Secretary of War." Act of January 20, 1885, c. 26, 23 Stat. 284. In 1887, Nebraska ceded to the United States "the jurisdiction of the State of Nebraska in and over the military reservations known as Fort Niobrara and Fort Robinson" on the following conditions (Laws of Nebraska, 1887, p. 628):

"*Provided,* That the jurisdiction hereby ceded shall continue no longer than the United States shall own and occupy said military reservations.

"Sec. 2. The said jurisdiction is ceded upon the express condition that the State of Nebraska shall retain concurrent jurisdiction with the United States in and over the said military reservations so far as that all civil process in all cases, and such criminal or other process may issue under the laws or authority of the state of Nebraska against any person or persons charged with crime or misdemeanors committed within said state, may be executed therein in the same way and manner as if such jurisdiction

had not been ceded except so far as such process may affect the real and personal property of the United States;

"*Provided,* That nothing in the foregoing act shall be construed so as to prevent the opening and keeping in repair public roads and highways across and over said reservations."

When the United States acquires title to lands, which are purchased by the consent of the legislature of the State within which they are situated "for the erection of forts, magazines, arsenals, dockyards and other needful buildings," (Const. Art. I, sec. 8) the Federal jurisdiction is exclusive of all State authority. With reference to land otherwise acquired, this Court said in *Fort Leavenworth Railroad Company* v. *Lowe,* 114 U. S. 525, 539, 541, that a different rule applies, that is, that the land and the buildings erected thereon for the uses of the national government will be free from any such interference and jurisdiction of the State as would impair their effective use for the purposes for which the property was acquired. When, in such cases, a State cedes jurisdiction to the United States, the State may impose conditions which are not inconsistent with the carrying out of the purpose of the acquisition. *Fort Leavenworth Railroad Company* v. *Lowe, supra; Chicago, Rock Island & Pacific Railway Company* v. *McGlinn,* 114 U. S. 542; *Benson* v. *United States,* 146 U. S. 325, 330; *Palmer* v. *Barrett,* 162 U. S. 399, 403; *Arlington Hotel Company* v. *Fant,* 278 U. S. 439, 451. The terms of the cession, to the extent that they may lawfully be prescribed, determine the extent of the Federal jurisdiction.

In the present instance, there is no question of the status of the Fort Robinson Military Reservation. Nebraska ceded to the United States its entire jurisdiction over the reservation save in the matter of executing process and opening and repairing roads or highways. It was in this view that the Federal Circuit Court decided

that, after this jurisdiction had been accepted by the United States, it could not be recaptured by the action of the State alone, and hence that an act of the legislature of Nebraska, passed in 1889, seeking to amend the act of cession was not effective, and that the statutes of the State regulating the sale of liquors were not in force within the ceded territory. *In re Ladd*, 74 Fed. 31. The conditions of the cession relating to the execution of criminal process were construed as intended to save the right to execute process within the reservation for crimes committed outside, that is, to prevent the reservation from being a sanctuary for fugitive offenders.

Accepting this construction of the conditions attached to the cession, we come to the question whether the jurisdiction over the reservation covered the right of way which Congress had granted to the railroad company. There was no express exception of jurisdiction over this right of way, and it can not be said that there was any necessary implication creating such an exception. The proviso that the jurisdiction ceded should continue no longer than the United States shall own and occupy the reservation had reference to the future and cannot be regarded as limiting the cession of the entire reservation as it was known and described. As the right of way to be located with the approval of the Secretary of War ran across the reservation, it would appear to be impracticable for the State to attempt to police it, and the Federal jurisdiction may be considered to be essential to the appropriate enjoyment of the reservation for the purposes to which it was devoted. There is no adequate ground for cutting down the grant by construction.

In 1911, a controversy arose with respect to fencing the right of way. The Secretary of War forbade the fencing and, in his communication to the railway company, said: "The State, by Act of March 29, 1887, ceded exclusive jurisdiction over this reservation, subject to the

usual reservations for service of process, and no statute of the State requiring railways to fence their rights of way can be regarded as operative within the reservation of Fort Robinson. Your right of way across the reservation divides it into two nearly equal parts. To place fences thereon would very greatly restrict the use of the reservation for drill and maneuver purposes, and, even though you should put in numerous passage-ways, would cause great inconvenience to the troops there stationed. . . . By reason of the foregoing considerations, I am constrained to inform you that the Government will not permit the erection of fences along the right of way of your company within the Fort Robinson military reservation, and you are hereby notified to remove all such fences heretofore erected by your company." The Supreme Court of Nebraska in the case of *Anderson* v. *Chicago & Northwestern Railway Company,* 102 Neb. 578, held that this refusal of the Secretary of War to permit the erection of fences along the right of way constituted a defense to an action against the railway company for the killing of cattle, although a statute of the State, if it had governed the case, would have made the company liable because of the failure to enclose its tracks.

The mere fact that the portion of the reservation in question is actually used as a railroad right of way is not controlling on the question of jurisdiction. Rights of way for various purposes, such as for railroads, ditches, pipe lines, telegraph and telephone lines across Federal reservations, may be entirely compatible with exclusive jurisdiction ceded to the United States. In *Benson* v. *United States, supra,* the jurisdiction of the Federal court was sustained with respect to an indictment for murder committed on a portion of the Fort Leavenworth Military Reservation in Kansas which was used for farming purposes. In *Arlington Hotel Company* v. *Fant, supra,* the

jurisdiction of the United States was upheld as to the portion of the reservation there in question which had been leased for use as a hotel. While the grant of the right of way to the railroad company contemplated a permanent use, this does not alter the fact that the maintenance of the jurisdiction of the United States over the right of way, as being within the reservation, might be necessary in order to secure the benefits intended to be derived from the reservation.

We do not consider the decisions cited by the District Court as requiring a different view. In the case of *Utah & Northern Railway* v. *Fisher,* 116 U. S. 28, there was involved the right of the Territory of Idaho to tax the land and other property of the railroad which the company contended were within an Indian reservation and therefore not taxable. The company argued that the Indian reservation was excluded from the limits of the Territory by the Act of Congress creating the Territory and also by a treaty with the Indians. The Court held that neither position could be sustained. It appeared that no treaty with the Indians was in existence at the time Congress created the Territory. The subsequent treaty did not require that the reservation should be excluded from the jurisdiction of the Territory when the exercise of that jurisdiction would not defeat the stipulations of the treaty for the protection of the Indians, and the Court found that the just rights of the Indians would not be impaired by the taxation of the railroad property. It also appeared that the Indians for a pecuniary consideration had ceded to the United States their title to so much of the reservation as might be needed for the uses of the railroad and that this strip of land was relinquished by Congress to the company. The Court decided that in these circumstances and by force of the cession the land was withdrawn from the reservation. In *Clairmont* v. *United States,* 225 U. S. 551, the Court held that one who

had liquor in his possession on a railroad train running on a right of way through the Flathead Indian Reservation in Montana was not guilty of the offense of introducing liquor into the "Indian country." By agreement between the Indians and the United States, the Indians had surrendered all their "right, title and interest," the land had been freed from the Indian right of occupancy, and the Indian title had thus been entirely extinguished. The land could not be considered "Indian country."

We conclude that the District Court erred in sustaining the plea.

Judgment reversed.

OHIO OIL COMPANY *v.* CONWAY, SUPERVISOR OF PUBLIC ACCOUNTS OF LOUISIANA.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF LOUISIANA.

No. 440. Argued March 4, 1930.—Decided April 14, 1930.

1. A Louisiana severance tax on crude petroleum at specific rates per barrel, the rates varying in accordance with a classification of the oils based on the Baumé Scale of Gravity, *held* consistent with Art. X, § 21 of the Louisiana Constitution, which provides that such natural resources "may be classified for the purpose of taxation and such taxes predicated upon either the quantity or the value of the product at the time and place where it was severed." P. 158.
2. The Fourteenth Amendment imposes no iron rule of equality prohibiting the flexibility and variety appropriate to schemes of state taxation. P. 159.
3. A State may impose different specific taxes on different products and in so doing is not required to make close distinctions or to maintain a precise, scientific uniformity with reference to composition, use, or value. It may classify broadly the subjects of taxation if it does so on a rational basis, avoiding classification that is palpably arbitrary. P. 159.
4. In laying a graduated specific severance tax per barrel on oils sold primarily for their gasoline content, resort to Baumé gravity

as the basis of classification cannot be regarded as palpably arbitrary, it appearing that gravity, though not invariably accurate as a test, is generally regarded in the industry as indicative of gasoline content and is used by the industry, including the complaining taxpayer, in fixing the prices of such oils. P. 160.

5. A graduation of the tax on this basis, which treats all oils of the same gravity alike, is not repugnant to the equal protection clause of the Fourteenth Amendment merely because the tax falls more heavily upon some oils than upon others of equal gravity due to the fact that there are various gravity schedules of prices and that some oils are sold at flat prices. P. 160.
6. The statute in question, by graduating the tax per barrel in accordance with a classification of oils based on their Baumé gravity, had the effect of including in the division of lowest tax a class of oils valuable chiefly as a source of lubricating oil rather than of gasoline, which are tested in the industry by their viscosity and sulphur content, not by their Baumé gravity, and are not sold on the latter basis. It resulted that the tax on these oils was lower in proportion to value than that imposed on other oils not so well suited for making lubricating oil. *Held* that the discrimination was not repugnant to the equal protection clause, since the oils especially suitable for making lubricating oil might lawfully have been classified apart for taxation, or not taxed at all, because of their distinct composition and utility (*Heisler* v. *Colliery Co.*, 260 U. S. 245), and the statute was not made invalid by the failure to describe them scientifically. P. 161.
7. The State is not prevented by the Federal Constitution from putting the same specific severance tax on the same sort of oils used in the same way, merely because particular producers of such oils obtain different prices for them. P. 162.

34 F. (2d) 47, affirmed.

APPEAL from a decree of the District Court of three judges, which dismissed the Oil Company's bill seeking to enjoin the enforcement of a Louisiana tax. The case was here before on appeal from an order denying an interlocutory injunction, 279 U. S. 813.

Mr. *Sidney L. Herold*, with whom *Messrs. Sumter Cousin* and *R. L. Benoit* were on the brief, for appellant.

Gravity in no respect enters as a common measurement into the ascertainment of the relative values of oils produced within Louisiana; and the selection of gravity as the basis of such admeasurements ineluctably leads to a systematic discrimination against the producers in the fields in which this complainant operates.

If gravity is not a common measure of value as between oils of different composition, there could be no more justification for its use in the measurement of the tax on all oils generally than there could be for the use of either the passenger-mile base or the ton-mile base for determining a common rate for both freight and passenger tariffs. Nor is it enough for the State to point out merely that the oils are of different weights. It is necessary that there be in that fact some reason for using it as a basis of classification. *Louisville Gas & Elec. Co.* v. *Coleman,* 277 U. S. 32.

Nothing can serve as a basis of classification that is not relevant either to value, to utility, to profit or to some end or purpose of sound public policy, where the direct result of its use is the imposition of materially variant tax burdens on persons similarly situated. Taxes may be levied on natural resources severed from the soil or water, to be paid proportionately by the owners thereof at the time of severance. The Louisiana Constitution and the statute both speak of the tax as one upon the product.

The case is entirely different from *Choctaw, O. & G. Ry. Co.* v. *Harrison,* 235 U. S. 290, and *Oliver Iron Mining Co.* v. *Lord,* 262 U. S. 172, where the tax was of a percentage on the gross receipts, or of the gross value of the product. Likewise, it differs from *Gulf Refining Co.* v. *McFarland,* 154 La. 251, 264 U. S. 573.

If this were in form a general property tax, and the assessing authorities had proceeded to value the properties of the various producers in the State, not according to their value, but according to the gravity of the oil produced, the same concrete result would have been

reached as in this case; and it is settled law that in such a case relief would be granted because of the violation of the equal protection clause of the Fourteenth Amendment occasioned by such act. *Raymond* v. *Chicago Traction Co.*, 207 U. S. 20; *Sunday Lake Iron Co.* v. *Wakefield Township*, 247 U. S. 350; *Sioux City Bridge Co.* v. *Dakota County*, 260 U. S. 441; *N. C. & St. P. R. Co.* v. *Taylor*, 86 Fed. 168; *Louisville Trust Co.* v. *Stone*, 107 Fed. 305; *Louisville Gas & Elec. Co.* v. *Coleman*, 277 U. S. 32; *Martin* v. *District of Columbia*, 205 U. S. 135; *Bell's Gap R. Co.* v. *Pennsylvania*, 134 U. S. 232.

Whether the denial of equal protection results from the use of the gravity scale or from the arbitrary system of classification thereunder, is immaterial.

Oils produced in the same district, and even from the same lease, would fall by the operation of the statute into separate classes paying entirely different and discriminatory rates of taxation. The record contains nothing from which the conclusion could be reached that an oil of 32 gravity produced in a particular field should pay a tax of 5 cents per barrel, while oil of 32.1 gravity in the same field should pay a tax of 8 cents per barrel; and yet such is the effect of the statute. The arrangement of the progression of the tax is such that the increase necessarily and systematically is unrelated to increase in value.

The act works a systematic and hostile discrimination against appellant in favor of others similarly situated, for at all times higher gravity oils of lower value are burdened with a materially higher tax than oils of lower gravity and greater value. The act "has no tendency to produce equality." Cf. *Air Way Electrical Appliance Corp.* v. *Day*, 266 U. S. 71; *Yick Wo* v. *Hopkins*, 118 U. S. 369; *Sunday Lake Iron Co.* v. *Wakefield Township*, 247 U. S. 350; *Southern Ry. Co.* v. *Green*, 216 U. S. 400.

Act 5 of 1928 of the Louisiana Legislature is void as in conflict with § 21 of Article X of the Constitution of

Louisiana. The tax is levied neither according to quantity nor to value.

The only measure of quantity is the barrel of 42 gallons. And yet the statute directly provides that such quantity shall be taxed, not at a fixed rate, but according to a scale under which the highest tax is almost three times that of the lowest one.

Mr. George Seth Guion, with whom *Messrs. Percy Saint,* Attorney General of Louisiana, and *W. H. Thompson,* Assistant Attorney General, were on the brief, for appellee.

Mr. Chief Justice Hughes delivered the opinion of the Court.

The Ohio Oil Company brought this suit in the District Court to enjoin the enforcement of a statute of Louisiana (Act 5 of 1928) imposing a severance tax upon the production of oil. The statute as applied to the complainant was attacked as a violation both of the constitution of Louisiana and of the equal protection clause of the Fourteenth Amendment of the Federal Constitution. It was alleged that the laws of the State afforded no remedy for the recovery of taxes illegally exacted. On appeal from an order denying an interlocutory injunction, this Court decided that the questions presented could not be resolved satisfactorily upon the affidavits submitted, and directed that an injunction should be granted *pendente lite* on stated terms. 279 U. S. 813. Trial was had before the District Court, as specially constituted under the applicable statute, and a decree was entered dismissing the bill. 34 Fed. (2d) 47. The complainant appeals.

In the year 1921, the constitution of Louisiana was amended so as to provide that natural resources severed from the soil or water might be classified for the purpose of taxation and that taxes might be "predicated upon

either the quantity or value of the product at the time and place where it is severed" (Const. Art. X, Sec. 21).[1] By Act 140 of 1922, section 2, natural resources were divided into two classes, and taxes were levied on oil and gas at three per cent. of the gross market value of the total production, and on all other natural resources at two per cent. of the gross market value. The Supreme Court of Louisiana, sustaining this tax on oil and natural gas, held that it was not a property tax but was an excise tax upon the privilege of severing, although it was measured by the value of the property severed. This decision was affirmed here. *Gulf Refining Company* v. *McFarland,* 154 La. Ann. 251; 264 U. S. 573.

In 1928, the legislature of Louisiana enacted the statute now in question which amended the prior act so as to tax various natural resources on the basis of the quantity severed. Under this amendment taxes on oil were classified according to gravity and ran from four cents a barrel of 42 gallons on oil of 28 degrees gravity and below, to eleven cents a barrel on oil above 43 degrees gravity (Act 5 of 1928).[2]

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[1] Section 21 is as follows: "Taxes may be levied on natural resources severed from the soil or water, to be paid proportionately by the owners thereof at the time of severance. Such natural resources may be classified for the purpose of taxation and such taxes predicated upon either the quantity or value of the product at the time and place where it is severed. No severance tax shall be levied by any parish or other local subdivision of the State.

"No further or additional tax or license shall be levied or imposed upon oil or gas leases or rights, nor shall any additional value be added to the assessment of land, by reason of the presence of oil or gas therein or their production therefrom."

[2] The text of section 2 of Act 5 of 1928 in relation to oil is as follows: "Taxes on natural resources severed from the soil or water . . . shall be predicated on the quantity severed, and shall be paid at the following rates:

. . . . . .

The business of the complainant in Louisiana is that of producing and selling oil and not of refining it. The production of the complainant is in the following fields: Haynesville, in the parish of Claiborne; Cotton Valley, in the parish of Webster; Pine Island, in the parish of Caddo; Urania, in the parish of La Salle. All these fields are in North Louisiana. The bulk of the complainant's production is in the Haynesville, Cotton Valley and Pine Island fields. Its production in these fields from January to June, 1928, inclusive, amounted to 723,192 barrels out of its total production in Louisiana of 762,139 barrels; and from August, 1928, to March, 1929, inclusive, to 690,397 barrels out of its total production of 705,301 barrels; the remainder was Urania production.

Gravity as used in the statute, and in oil price quotations, is not specific gravity, but what is called Baumé gravity, under which the lighter the oil the higher the gravity. The record shows that, generally speaking, crude petroleums are divided into three classes—paraffine base, asphalt base, and mixed base, the last being a combination of paraffine and asphalt base. The higher gravity oils usually have a paraffine base, while the lower gravity oils usually have an asphalt base. All three of these classes are found in Louisiana. In North Louisiana

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"(7) a. On oil of 28 gravity and below, four (4) cents per barrel of 42 gallons.

"b. (1) On oil above 28 gravity and not above 31 gravity, four and one-fourth (4¼) cents per barrel of 42 gallons.

"b. (2) On oil above 31 gravity and not above 32 gravity, five (5) cents per barrel of 42 gallons.

"(c) On oil above 32 gravity and not above 36 gravity, eight (8) cents per barrel of 42 gallons.

"(d) On oil above 36 gravity and not above 43 gravity, ten (10) cents per barrel of 42 gallons.

"(e) On oil above 43 gravity, eleven (11) cents per barrel of 42 gallons."

there are paraffine base, asphalt base and mixed base crudes, the oils generally having paraffine base, while in South Louisiana the oil produced is mostly asphalt base.

The process of refining oil is distillation. The evidence is that paraffine base oil in that manner yields gasoline, kerosene, gas oil, some lubricating oil and wax. Gasoline comes off first and is the most valuable component of such oil. Asphalt base oil usually yields a very small amount of gasoline by distillation, the first product ordinarily being gas oil, then lubricating oil, and the residuum, asphalt. The gas oil may be subjected to the cracking process and gasoline may be obtained in that way. The value of asphalt base oil is largely for the manufacture of lubricating oil, and the value for this purpose is determined by viscosity and sulphur content, not by gravity. The coastal oils of South Louisiana are divided into "A" and "B" grades, "Grade A" being the oils that are useful in the production of lubricating oil, and the other oils being classed as "Grade B." While gravity is not the determining factor, it appears from the testimony that "Grade A" oils must be less than 25 degrees gravity.

Asphalt base oils are produced in North Louisiana in the fields of Pine Island, Urania, Hosston and Bellevue. The last three named are suitable for making lubricating oil, but the Pine Island heavy oil does not have that value. The evidence is that the Urania, Hosston and Bellevue oils, used for that purpose, are practically the same as the coastal "Grade A" oils.

Gravity is said to be an index of relative value of oils only in the same pool or district, and oils of different gravity are produced in the same fields and from the same tracts of land and sometimes from the same sand. But it appears that, with respect to paraffine base oils, the higher the gravity, the greater is the gasoline content,

which as between these oils is largely determinative of price. Gravity in such cases is a rough and familiar method of approximating the gasoline content, and in many fields price quotations of crude oil above 28 degrees are graduated according to gravity.

Crude oil as it comes from the wells is run into tanks from which the purchaser sells to pipe lines, the well-recognized market prices being the prices posted by the pipe line companies buying the oil. The complainant states that the oil produced in its Haynesville field was from 33 to 36 degrees gravity; in its Cotton Valley field, one class was between 28 and 31 degrees gravity and another above 43 degrees gravity; in its Pine Island field, its production was from 37 to 41 degrees gravity. The complainant purchased no crude oil except that, in the Haynesville field, it bought some of the royalty oil of the lessors under its leases. The complainant's cashier testified at the trial that complainant's "purchases and sales in each field in which it operates are made on a gravity basis."

This testimony is not understood to include the Urania field in which the complainant was not operating at the time but had been operating until shortly before. The oil from the Urania field, which was about 20 degrees gravity, as well as that of the Bellevue and Hosston fields in North Louisiana, and the "Grade A" coastal oils of South Louisiana, were sold at a flat price and not by gravity. "Grade B" oil, it was testified, was usually sold on a gravity schedule.

In 1928, the production of oil in Louisiana was about 22,000,000 barrels, of which approximately two-thirds was produced in North Louisiana, and of this amount nearly two-thirds was sold on a gravity basis, and the remainder at a flat price. Of the production in South Louisiana, about one-half was sold on a gravity basis.

Price quotations, concededly accurate, for Louisiana crude oils, as well as for Mid-Continent, North and Cen-

tral Texas, Gulf Coast, and other sections, are shown in the trade journals and were put in evidence. The quotations that are according to gravity have a rising scale of prices as gravity increases.[3]

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[3] Among the price quotations for crude oil produced in Louisiana-Arkansas, set forth in "The Oil Weekly" of May 25, 1928, are the following:

LOUISIANA-ARKANSAS (ALL COMPANIES)*

Homer, Haynesville, Caddo, El Dorado, De Soto and Crichton and Cotton Valley.**

Below 28 gravity	$0.91
28 to 28.9 gravity	.96
29 to 29.9 gravity	1.01
30 to 30.9 gravity	1.06
31 to 31.9 gravity	1.11
32 to 32.9 gravity	1.16
33 to 33.9 gravity	1.19
34 to 34.9 gravity	1.22
35 to 35.9 gravity	1.25
36 to 36.9 gravity	1.28
37 to 37.9 gravity	1.31
38 to 38.9 gravity	1.34
39 to 39.9 gravity	1.37
40 to 40.9 gravity	1.40
41 to 41.9 gravity	1.43
42 to 42.9 gravity	1.46
43 to 43.9 gravity	1.49
44 to 44.9 gravity	1.52
45 to 45.9 gravity	1.55
46 to 46.9 gravity	1.58
47 to 47.9 gravity	1.61
48 to 48.9 gravity	1.64
49 to 49.9 gravity	1.67
50 to 50.9 gravity	1.70
51 to 51.9 gravity	1.73
52 and above	1.76

* Shreveport-El Dorado's postings stop at about 40 gravity.

** Below 36 gravity, the posting on Cotton Valley is 75 cents. From 36 to 52 and above the regular gravity schedule is followed.

* * * * * *

In the case of the oils under 28 degrees gravity that were sold at a flat price, it appears that there was a considerable difference between the price of oils of the North and South Louisiana fields. With respect to oils

Bellevue	$1.25
Jennings	1.15
Vinton	1.30
Edgerly	1.30
Starks Dome	1.30
Urania	.75
Calion	.75

Another list of quotations in the same issue of "The Oil Weekly" is as follows:

GULF COAST

Grade "A" all companies	$1,20
Gulf Coast Light Oil, below 25	1.15
25 to 25.9 gravity	1.17
26 to 26.9 gravity	1.19
27 to 27.9 gravity	1.21
28 to 28.9 gravity	1.23
29 to 29.9 gravity	1.25
30 to 30.9 gravity	1.27
31 to 31.9 gravity	1.29
32 to 32.9 gravity	1.31
33 to 33.9 gravity	1.33
34 to 34.9 gravity	1.35
35 to 35.9 gravity	1.37
36 to 36.9 gravity	1.39
37 to 37.9 gravity	1.41
38 to 38.9 gravity	1.43
39 to 39.9 gravity	1.45.
40 and above	1.47

Humble Oil & Refining Company's postings on Gulf Coast Light stop at 35 to 35.9. Its price on all crudes above 35 to $1.37 per barrel.

Magnolia Petroleum Company's postings stop at 31 to 31.9.

suitable for making lubricating oil, the evidence is that in February, 1928, the price of the complainant's Urania oil was 75 cents a barrel, while that of the coastal "Grade A" oils was $1.20 a barrel, and the Louisiana tax on each, the gravity being under 28 degrees, was four cents a barrel. The respondent states that the oils of these Louisiana fields are shipped to a common market, Port Arthur, Texas, and, by reason of the greater distance, the transportation charges for the oils of North Louisiana are

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The following table is taken from "The Oil and Gas Journal" of June 13, 1929:

CRUDE OIL GRAVITY TABLE

Gravity	Okla., Kans., N. C., Tex.	No. La. and Arkans.	Crane, Upton, Crockett, Winkler, Howard, Pecos, Texas crudes, and Lea, N. Mex.	Stephens, Ark.	Wheeler (Texas Panhandle)	Gray County (Texas Panhandle)	Carson and Hutchinson (Texas Panhandle)	Salt Creek, Wyo.	Grade 3 & Light Crude (G. Coast)	Somerset (South Central Texas)
	1	2	3	4	5	6	7	8	9	10
24 and above	------	------	----------	------	------	------	------	------	------	------
Below 24	------	------	----------	------	------	------	------	------	------	------
Below 25	0.85	------	0.70	------	------	------	------	------	1.15	------
25 to 25.9	.90	------	.74	------	------	------	------	------	1.18	------
26 to 26.9	.95	------	.78	------	------	------	------	------	1.21	------
27 to 27.9	1.00	------	.82	------	------	------	------	------	1.24	------
Below 28	------	1.00	----------	0.90	0.90	0.90	0.90	------	------	------
28 to 28.9	1.05	1.05	.86	.94	.90	.90	.90	------	1.27	------
29 to 29.9	1.10	1.10	.90	.98	.90	.95	.90	1.10	1.30	------
30 to 30.9	1.15	1.15	.94	1.02	.95	1.00	.90	1.15	1.33	------
31 to 31.9	1.20	1.20	.98	1.06	1.00	1.05	.90	1.20	1.36	------
32 to 32.9	1.25	1.25	1.02	1.10	1.05	1.10	.95	1.25	1.39	1.05
33 to 33.9	1.30	1.30	1.06	------	1.10	1.15	1.00	1.30	1.42	1.07
34 to 34.9	1.35	1.35	1.10	------	1.15	1.20	1.05	1.35	1.45	1.09
35 to 35.9	1.40	1.40	1.14	------	1.20	1.25	1.10	1.40	1.48	1.11
36 to 36.9	1.45	1.45	1.18	------	1.25	1.30	1.15	1.45	------	1.13
37 to 37.9	1.50	1.50	----------	------	1.30	1.35	1.20	1.50	------	1.15
38 to 38.9	1.55	1.55	----------	------	1.35	1.40	1.25	------	------	1.17
39 to 39.9	1.60	1.60	----------	------	1.40	1.45	1.30	------	------	------
40 to 40.9	1.65	1.65	----------	------	1.45	1.50	1.35	------	------	------
41 to 41.9	1.70	1.70	----------	------	1.50	1.55	1.40	------	------	------
42 to 42.9	1.75	1.75	----------	------	1.55	1.60	1.45	------	------	------
43 to 43.9	1.80	1.80	----------	------	1.60	1.65	1.50	------	------	------
44 and above	1.85	1.85	----------	------	1.65	1.70	1.55	------	------	------

greater than those from South Louisiana; this fact, the respondent insists, accounts for the difference in the price of the oils at the wells.

The complainant's contention under the constitution of Louisiana is that the tax is invalid because it was not levied according to either quantity or value. It manifestly is a specific tax at a rate per barrel of 42 gallons, and not strictly *ad valorem*. The graduation of the tax according to the gravity of the oil does not make it other than a tax according to quantity, that is, per barrel, as the oils of different classes are treated for the purpose of the tax as being in effect different commodities, each of which has its separate tax. We have not been referred to any decision of the state court upon the point and, until that court pronounces otherwise, we see no reason to hold that the tax is unauthorized by the State.

The further argument is made that the classification of oils is unreasonable and hence is not permitted by the state constitution. This is substantially the same question, from the standpoint of state authority, that is presented as a Federal ground of attack under the Fourteenth Amendment.

The complainant contends that the statute of Louisiana, imposing a tax according to gravity, operates as an arbitrary discrimination; that it discriminates in a wholly unjustifiable manner between the oils of the North Louisiana and South Louisiana fields, and also between the fields producing asphalt base oils. The tax on its production in the Haynesville, Cotton Valley and Pine Island fields is said to be at a rate from about six to seven and one-half per cent. of its value; and on the production in the Urania field, at about five and one-third per cent. of the value; while on the production in fields in South Louisiana, and in the Bellevue field, in North Louisiana, the tax is between three and three and one-half per cent. of the value.

The applicable principles are familiar. The States have a wide discretion in the imposition of taxes. When dealing with their proper domestic concerns, and not trenching upon the prerogatives of the national government or violating the guarantees of the Federal Constitution, the States have the attribute of sovereign powers in devising their fiscal systems to insure revenue and foster their local interests. The States, in the exercise of their taxing power, as with respect to the exertion of other powers, are subject to the requirements of the due process and the equal protection clauses of the Fourteenth Amendment, but that Amendment imposes no iron rule of equality, prohibiting the flexibility and variety that are appropriate to schemes of taxation. The State may tax real and personal property in a different manner. It may grant exemptions. The State is not limited to *ad valorem* taxation. It may impose different specific taxes upon different trades and professions and may vary the rates of excise upon various products. In levying such taxes, the State is not required to resort to close distinctions or to maintain a precise, scientific uniformity with reference to composition, use or value. To hold otherwise would be to subject the essential taxing power of the State to an intolerable supervision, hostile to the basic principles of our Government and wholly beyond the protection which the general clause of the Fourteenth Amendment was intended to assure. *Bell's Gap Railroad Company* v. *Pennsylvania,* 134 U. S. 232, 237; *Magoun* v. *Illinois Trust & Savings Bank,* 170 U. S. 283, 293; *Southwestern Oil Company* v. *Texas,* 217 U. S. 114, 121; *Brown-Forman Company* v. *Kentucky,* 217 U. S. 563, 573; *Sunday Lake Iron Company* v. *Wakefield,* 247 U. S. 350, 353; *Heisler* v. *Thomas Colliery Company,* 260 U. S. 245, 255; *Oliver Iron Mining Company* v. *Lord,* 262 U. S. 172, 179; *Stebbins* v. *Riley,* 268 U. S. 137, 142.

With all this freedom of action, there is a point beyond which the State can not go without violating the equal protection clause. The State may classify broadly the subjects of taxation, but in doing so it must proceed upon a rational basis. The State is not at liberty to resort to a classification that is palpably arbitrary. The rule is generally stated to be that the classification "must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." *Royster Guano Company* v. *Virginia,* 253 U. S. 412, 415; *Louisville Gas Company* v. *Coleman,* 277 U. S. 32, 37; *Air-Way Corporation* v. *Day,* 266 U. S. 71, 85; *Schlesinger* v. *Wisconsin,* 270 U. S. 230, 240.

In the present instance it is apparent that a classification according to gravity cannot be regarded as palpably arbitrary. While the Baumé gravity of oils may vary, even in the same fields, it has been used by the oil industry as indicating in a general way, apparently satisfactory for practical purposes, the gasoline content. In laying a specific severance tax per barrel, the State was not compelled to make an exact determination of the composition of each oil produced. At least with respect to oils sold primarily for the gasoline they contained, it cannot be said that the State attempted a hostile and unjustifiable discrimination in graduating its tax according to gravity, when the industry itself resorted to the factor of gravity in fixing the scale of prices for such oils. Further, the complainant is in no position to contest the action of the State in adopting a gravity basis with respect to the production of its oils in the Haynesville, Cotton Valley and Pine Island fields, which constituted over ninety per cent. of its entire production, as the complainant itself sold these oils on a gravity basis. If it be granted, as we think it must be, that the State could adjust the severance tax with respect to such oils according to gravity, the

question comes simply to that of the particular graduation of the tax. There are, it is true, various gravity schedules of prices, and the same fields may produce oils of different gravities, and oils broadly of the same sort may be sold at flat prices, but, if the State was at liberty to adopt a gravity scale for oils which in such large measure were sold on this basis, the State was not required to grade its tax with a nicety which would assign to every oil produced a grade absolutely corresponding to its actual value. That would mean that the State could tax only on a strictly *ad valorem* basis, a contention wholly inadmissible. In grading a tax, admittedly within its power to levy, the State had a large discretion and there appears to be no ground for holding that there was such an abuse in this instance as to create constitutional invalidity. *Clark* v. *Titusville,* 184 U. S. 329, 331. The graduation of the tax on these oils corresponded generally to the supposed increase of gasoline content, and all oils of the same gravity were treated alike.

The question raised by the complainant has particular bearing upon the discrimination with respect to oils under 28 degrees gravity. The complainant in this respect must stand on its own case. Its oil of this sort is its Urania production, and that oil, as well as that of the Bellevue field in North Louisiana, is said to be "practically the same" as the coastal "Grade A" oils of South Louisiana. According to complainant's own showing, these oils are especially suited to the manufacture of lubricating oil and are dealt in with that in view. While in such cases, gravity is not the criterion, but rather viscosity and sulphur content, these are oils of relatively low gravity, that is, under 28 degrees, and the Louisiana severance tax is a uniform one of four cents a barrel. As these last mentioned oils had a distinct composition and a different utility, the State could impose a tax upon them which was different from that imposed upon the other oils pro-

duced by the complainant and not so well suited for the making of lubricating oil. The State might have concluded not to tax the former at all, and in that case there would have been no constitutional ground of complaint because a tax was laid on the different oils of the Haynesville, Cotton Valley and Pine Island fields. In *Heisler* v. *Thomas Colliery Company, supra*, complaint was made of a statute of Pennsylvania because it levied a tax on anthracite coal and not on bituminous coal. The contention was founded on the fact that both were fuels and that anthracite coal in steam sizes competed with bituminous coal and certain sub-grades of the latter competed with certain sub-grades of anthracite. The Court, accepting the fact of competition, nevertheless sustained the tax, holding that the differences between the two sorts of coal justified the classification. If the State had described the oils especially suitable for the manufacture of lubricating oil with respect to their composition or use, and had taxed them at four cents a barrel, it could not be said that the statute was beyond the power of the State to enact simply because it subjected the complainant to a different tax on its oils of a different character. The statute is not made invalid by reason of a failure to describe the oils scientifically.

The question is thus reduced to the discrimination alleged with respect to the tax on the complainant's Urania production as compared with similar oils. As all these oils bear the same tax of four cents a barrel, the complainant manifestly has no ground for complaint on this score unless it can be found in differences in the prices of these oils. Urania oil was sold at seventy-five cents a barrel, while "Grade A" oil brought $1.20 a barrel. The record affords no explanation of the reason for this wide spread in the price of oils, said to be practically the same and used for the same purpose, unless it be the one advanced by the respondent that the difference is due to the

distance of the fields from the common market and the consequent difference in transportation charges. Whether or not this is an adequate explanation, it can not be said that the State, from the standpoint of the Federal Constitution, could not put the same specific severance tax on the same sort of oils used in the same way, merely because particular producers of such oils might obtain different prices. There may be many reasons why one owner obtains more in gross return for the same sort of commodities than another owner, and still other reasons why the net returns of the one may be more than those of the other. This Court recently decided that a tax imposed by Alabama on those selling cigars and cigarettes, which was based on the "wholesale sales price" was not repugnant to the Fourteenth Amendment because of an alleged difference in the wholesale prices paid by dealers who bought from the manufacturers and by those who did not. *Exchange Drug Company* v. *Long*, decided March 12, 1930, *post*, p. 693. A classification of theatres for license fees according to prices of admission was held to be valid, although some of the theatres charging the higher admission, and paying the higher tax, had the less revenue. *Metropolis Theatre Company* v. *Chicago*, 228 U. S. 61. We find no ground for holding that the tax in this instance violated the Federal Constitution.

Judgment affirmed.

KENTUCKY *v.* INDIANA ET AL.

No. 16, Original. Argued March 3, 4, 1930.—Decided April 14, 1930.

Kentucky sued Indiana in this Court on a contract between them for the building, with the consent of Congress, of a bridge across the Ohio River. Certain individuals, who were citizens, voters and taxpayers of Indiana and who had brought a suit in an Indiana court to restrain its officers from performing the contract, upon the ground that it was unauthorized by the law of Indiana and

void, were joined as defendants in Kentucky's bill. The bill prayed for a decree requiring Indiana to specifically perform the contract and enjoining the individuals from prosecuting their suit. The individuals contested the jurisdiction of this Court and the validity of the contract. But Indiana admitted its validity and averred her desire to perform it, setting up as her only excuse for delay the litigation in the Indiana court and her unwillingness to proceed until there had been a final adjudication establishing her right to perform, adding that if this Court should grant the relief prayed against her by Kentucky, she would proceed immediately to perform the contract. *Held:*

1. That a controversy between the two States is presented, within the original jurisdiction of this Court. P. 173.

2. A State sued in this Court by virtue of the original jurisdiction over controversies between States, must be deemed to represent all its citizens, and its appropriate appearance here by its proper officers is conclusive upon that point. *Id.*

3. Citizens, voters and taxpayers of a State, merely as such and without showing any further or proper interest, have no separate, individual right to contest in such a suit the position taken by the State itself. *Id.*

4. An individual citizen may be made a party where relief is properly sought against him in a suit between States, and in such case he should have opportunity to show the nature of his interest and why the relief asked against him individually should not be granted. *Id.*

5. In the present instance, since the individuals have no interest with respect to the contract or its performance other than that of citizens and taxpayers generally of Indiana, and since they were joined as defendants merely for relief against them incidental to the relief sought by the plaintiff against the defendant State, they have no standing to litigate the validity and enforceability of the contract as between the States. P. 174.

6. Inasmuch as a decree of this Court in this suit would bind the State of Indiana and, on being shown, would bar any inconsistent proceedings in her courts, no sufficient ground appears for maintaining the bill against the individual defendants, and it should be dismissed as against them. P. 175.

7. If, in accordance with the pleading of each State, the contract be deemed authorized and valid, the mere pendency of the suit by citizens to restrain its performance does not constitute a defense. P. 176.

8. Where States are before this Court for the determination of a controversy between them, the Court must pass upon every question essential to such determination, although local legislation and questions of state authorization may be involved. P. 176.

9. It being conceded by the parties that performance of the contract is a matter of grave interest to the two States and to the public, and that delay is causing irreparable injury to Kentucky not remediable at law, postponement of decision, merely that this Court might have the advantage of a decision by the Indiana court in the suit of the Indiana citizens, would not be justified. P. 177.

10. Upon the record in this case, it is unnecessary for the Court to search the legislation underlying the contract in order to discover grounds of defense which the defendant State does not attempt to assert. P. 178.

Bill dismissed as to individual defendants.

Decree for plaintiff against defendant State.

FINAL HEARING, upon the pleadings and an agreed statement of facts, of a suit by Kentucky for specific performance by Indiana of a contract between them to build a bridge, and for an injunction to restrain individual defendants from prosecuting litigation in Indiana impeding the performance of the contract by that State.

Mr. Clifford E. Smith, Assistant Attorney General of Kentucky, with whom *Messrs. J. W. Cammack,* Attorney General, and *M. B. Holifield,* Assistant Attorney General, were on the brief, for the Commonwealth of Kentucky.

The individual defendants have no right to induce or cause the State of Indiana to breach its contract with Kentucky. It would be an anomaly if the contract entered into by the proper officers pursuant to legislative authority could be declared invalid by the courts of either State. If such were the rule, the courts of one State might hold the contract to be valid and the courts of the other State might hold it to be invalid. Cf. *Arkansas* v. *Tennessee,* 246 U. S. 158.

The prosecution of the suit in Indiana is of little importance, for the reason that the decisions of the courts

of Indiana cannot be binding on Kentucky; but the pendency of the suit has led Indiana to refuse to perform the covenants of the contract, and the only tribunal that does or can have jurisdiction of all the parties, and which can pass upon the validity of the contract and enforce performance thereof is this Court. Since this Court has exclusive jurisdiction to hear and determine the controversy, it has power under § 263 of the Judicial Code to prevent the further prosecution of the suit in the state court and to require the individuals to appear in this Court and assert their claims here.

The bill presents a "case" and "controversy" between Kentucky and Indiana, and citizens of the State of Indiana, within the original jurisdiction of this Court under Art. III, § 2, of the Constitution and § 233 of the Judicial Code. *Virginia* v. *West Virginia,* 246 U. S. 565; *Kansas* v. *Colorado,* 185 U. S. 125; *Oklahoma* v. *Atchison, T. & S. F. R. Co.,* 220 U. S. 277; *Wisconsin* v. *Pelican Ins. Co.,* 127 U. S. 265; *Louisiana* v. *Texas,* 176 U. S. 1; *Pennsylvania* v. *Wheeling & Belmont Bridge Co.,* 13 How. 519; *Muskrat* v. *United States,* 219 U. S. 346; *In re Pacific R. Co.,* 32 Fed. 241; *Foster & Elam* v. *Neilson,* 2 Pet. 253; *Missouri* v. *Illinois,* 200 U. S. 496; *South Dakota* v. *North Carolina,* 192 U. S. 286; *Cohens* v. *Virginia,* 6 Wheat. 264; *Rhode Island* v. *Massachusetts,* 12 Pet. 657; *Missouri* v. *Illinois,* 180 U. S. 208; *Kansas* v. *Colorado,* 206 U. S. 46; *In re Ayers,* 123 U. S. 443.

The contract is fully authorized and supported by the statutes of Indiana, Kentucky, and the United States, and was made pursuant to express consent of Congress.

The contract should be specifically enforced on the grounds of the public interest, inadequacy of a legal remedy; multiplicity of suits, and the definiteness of the contract, as all of the technical and supervisory services have been provided for by the employment of consulting engineers.

The provision of § 265 of the Judicial Code forbidding injunctions to stay proceedings in state courts must be construed in connection with § 262 of the Judicial Code; and if a federal court has obtained jurisdiction of the case, it can take such action as may be necessary to maintain its authority and enforce its decree. In the case at bar the Supreme Court of the United States has original and exclusive jurisdiction, and the Indiana court has neither jurisdiction of the parties to the contract involved, nor of the subject matter.

Mr. Thomas P. Littlepage presented the oral argument, and *Messrs. Fred C. Gause, Walter Pritchard, Frank H. Hatfield,* and *Louis L. Roberts,* were on the brief, for the individual defendants.

The bill presents no controversy between two States, or between a State and another State and citizens of another State.

The contract contains no limitation date for performance, nor does it provide that time is of the essence, nor does it fix any dates for the performance of any of its provisions. The mere fact that Indiana is unwilling to proceed until the validity of the contract is determined, does not constitute a breach; and inasmuch as both the bill and the answer state that Indiana is willing to perform the contract in accordance with its terms, there can be no controversy between the two States which would authorize the institution of this suit.

There is no contractual or other obligation between the individual defendants and Kentucky, nor can there be any claim by Kentucky that such defendants by instituting their litigation violated any rights of Kentucky. The relief sought by Kentucky against them is only to restrain action in the state court in order to obviate the allegation of Indiana that it is unwilling to proceed with the contract until such litigation is disposed of.

The bill seeks an injunction to stay proceedings in a state court of general jurisdiction. Under § 265 of the Judicial Code, such injunction is prohibited. *Slaughter House Cases,* 10 Wall. 273; *Moran* v. *Storges,* 154 U. S. 256; *Iowa* v. *Schlimmer,* 248 U. S. 115; *Sargent* v. *Hilton,* 115 U. S. 348; *Essaner* v. *Kane,* 258 U. S. 358.

The contract was entered into by the State Highway Commission of Indiana without authority and is unenforceable against Indiana.

Kentucky has a plain, adequate and complete remedy at law for any breach of the contract by suit in this Court against Indiana for damages.

In so far as the bill prays for a decree of specific performance, such decree would require action by political and legislative authority of another State, and this Court would not ordinarily undertake such authority; and moreover, a court will not decree specific performance of a building and construction contract such as that here involved; and prayer for a decree restraining Indiana from failing to perform the contract is in effect merely a prayer for specific performance.

The only effective relief sought by the bill is an injunction to stay proceedings in a local state court attacking the validity of the contract and the right of officers of the State of Indiana to disburse funds in carrying out the contract, involving the interpretation of the Indiana law with respect to which a decision of the Supreme Court of Indiana would be final.

Inasmuch as there is now pending in the Indiana state courts of general jurisdiction a case involving the interpretation of Indiana statutes, as to which the opinion of the Supreme Court of Indiana would be final, there is now no occasion for this Court to attempt to interpret such statutes.

Messrs. Arthur L. Gillion, former Attorney General of Indiana, *James M. Ogden,* Attorney General, and *Connor D. Ross,* Assistant Attorney General, were on the briefs for the State of Indiana.

Mr. Chief Justice Hughes delivered the opinion of the Court.

In September, 1928, the Commonwealth of Kentucky and the State of Indiana, by their respective Highway Commissions, entered into a contract for the building of a bridge across the Ohio River between Evansville, Indiana, and Henderson, Kentucky. The contract was approved by the Governor and, as to legality and form, also by the Attorney General, of each State. The contract recited the acts of Congress and of the state legislatures which were deemed to authorize the enterprise. Acts of Congress of July 11, 1916, 39 Stat. 355; March 2, 1927, 44 Stat. 1337; March 3, 1927, 44 Stat. 1398. Indiana, Act of 1919, Chap. 53; Act of 1927, Chap. 10. Kentucky, Acts of 1928, chapters 172 and 174. The State of Indiana immediately began the performance of the covenants of the contract on its part and, thereupon, nine citizens and taxpayers of Indiana brought suit in the Superior Court of Marion County in that State to enjoin the members of the Highway Commission and other officers of Indiana from carrying out the contract upon the ground that it was unauthorized and void.

The Commonwealth of Kentucky then asked leave to file the bill of complaint in this suit against the State of Indiana and the individuals who were plaintiffs in the suit in the state court, seeking to restrain the breach of the contract and the prosecution of that suit, and for specific performance. In its return to the order to show

cause why this leave should not be granted, the State of Indiana said that it had "no cause to show"; that the State intended ultimately to perform the contract, if performance were permitted or ordered by the courts in which the litigation over the contract was pending, but that it did not intend to do so until after that litigation had finally been disposed of favorably to its performance; that the State of Indiana had entered into the contract by virtue of authority of its own statutes and of the Act of Congress of March 2, 1927; that as there was no court having complete jurisdiction over the parties and subject matter, other than this Court, the State yielded to the jurisdiction of this Court, and that it was in the public interest that an early adjudication be had which would be final and binding upon all parties interested.

Leave being granted, the bill of complaint herein was filed. It set forth the contract and the pertinent statutes, the pendency of the Indiana suit (to which the Commonwealth of Kentucky was not, and could not be made, a party), that the delay in the construction of the bridge would cause irreparable injury to the Commonwealth of Kentucky, and that the complainant had no adequate remedy other than through this suit. The complaint further alleged that the northern approach to the bridge would rest on and extend over Indiana soil and the southern approach would be on Kentucky soil; that the State of Indiana as well as the Commonwealth of Kentucky had full authority to enter into the contract under the state statutes cited, and that the contract was also authorized by the acts of Congress to which reference was made. The complaint was later amended to correct an inaccurate citation.

Separate answers were filed by the State of Indiana and by the individual defendants. The answer of the State of Indiana admitted that the allegations of the complaint were true. The answer then averred:

"The only excuse which the State of Indiana offers for failure to perform the contract set out in plaintiff's complaint is the litigation, mentioned in the complaint, instituted by her above-named co-defendants against the officers of the State of Indiana whose function it is to perform said contract. The resulting delay in performance of said contract is in breach of its terms, which contemplate immediate and continued performance."

After stating that as the validity of the contract had been drawn in question in the litigation in the state court, the State did not feel warranted in proceeding until there was a final adjudication establishing its right to perform, the answer added:

"The State of Indiana believes said contract is valid. If this honorable court shall grant the relief prayed against Indiana by plaintiff Commonwealth of Kentucky in either of its paragraphs of complaint, the State of Indiana will thereupon immediately proceed with the performance of said contract and will continue such performance until the objects of said contract shall have been fully attained as contemplated by the terms thereof."

The individual defendants filed an answer and, at the same time, moved to dismiss the complaint upon the ground that there was no controversy between the two States or between the Commonwealth of Kentucky and the individual defendants; that under Section 265 of the Judicial Code no injunction should be granted staying proceedings in the suit in the state court; that the proceedings involved the interpretation of the statutes and laws of Indiana; that the contract was not binding on the State of Indiana, being made without authority of law; and that the Commonwealth of Kentucky had an adequate remedy at law. The answer of the individual defendants admitted the making of the contract but denied its validity. The parties, pursuant to a stipulation,

moved to submit the case upon the pleadings and briefs, including the separate motion of the individual defendants to dismiss. The motion to submit was denied, the motion to dismiss was postponed, and the case was assigned for oral argument. Later, the Commonwealth of Kentucky moved to strike out the answers and for a decree *pro confesso*.

After hearing argument, the court overruled the motion to dismiss in so far as it questioned the jurisdiction of the court to entertain the bill of complaint and to proceed to a hearing and determination of the merits of the controversy, and directed that all other questions sought to be presented by that motion be reserved for further consideration at the hearing upon the merits.

A statement of facts, to which the complainant, the defendant State and the individual defendants agreed, was then filed. It admitted the allegations of the complaint with respect to the enactment of the various statutes mentioned and the making of the contract. It set forth that the State of Indiana by its Highway Commission and proper officers were "now ready and anxious to perform said contract," but would not do so until there was a final adjudication by the Supreme Court of Indiana or by this Court; that it was of great interest and concern to both States that the litigation should be determined as early as possible, consistently with the convenience of the Court; that the failure of the State of Indiana promptly to perform the covenants of the contract on its part had caused and will cause the Commonwealth of Kentucky injury and damage for which no adequate remedy at law exists; and that the Commonwealth of Kentucky was, and had been, "ready, able and willing" to perform the covenants of the contract on its part. It was also stated that all the allegations made by the State of Indiana in its answer were true. There was fur-

ther agreement to the effect that the blue prints and drawings filed herein correctly showed the location approved for the bridge by both States, the boundary line between the States, the location of the spans, bridge structure and approaches, the high water lines and the topography at the site of the bridge. It was agreed that the individual defendants were citizens, voters and taxpayers of Indiana and the operators of automobiles on which they paid license fees to that State. Pursuant to a stipulation, the Highway Commission of Indiana filed a statement showing the appropriations made by that State bearing upon the construction of the bridge.

A motion to set the cause for hearing upon the pleadings and the agreed statement of facts was granted, and the cause has been heard.

The question of the jurisdiction of this Court was determined on the hearing of the motion to dismiss. The State of Indiana, while desiring to perform its contract, is not going on with its performance because of a suit brought by its citizens in its own court. There is thus a controversy between the States, although a limited one.

A State suing, or sued, in this Court, by virtue of the original jurisdiction over controversies between States, must be deemed to represent all its citizens. The appropriate appearance here of a State by its proper officers, either as complainant or defendant, is conclusive upon this point. Citizens, voters and taxpayers, merely as such, of either State, without a showing of any further and proper interest, have no separate individual right to contest in such a suit the position taken by the State itself. Otherwise, all the citizens of both States, as one citizen, voter and taxpayer has as much right as another in this respect, would be entitled to be heard. An individual citizen may be made a party where relief is properly sought as against him, and in such case he should have

suitable opportunity to show the nature of his interest and why the relief asked against him individually should not be granted.

If the controversy within the original jurisdiction of this Court is over a contract alleged to have been made between two States, to which an individual defendant is not a party, it is manifest that such an individual defendant, merely as a citizen, voter and taxpayer of the defendant State, is not entitled to enter upon a separate contest in relation to the merits of the controversy so far as it relates to the making of the contract by the two States and the obligations that the contract imposes upon his State, and does not relate to any separate and proper interest of his own. The fact that an individual citizen in such a case is made a party defendant in order that the complainant may obtain some particular relief against him, which is merely incidental to the complete relief to which the complainant would be entitled if it should prevail as against the defendant State, gives such an individual defendant no standing to litigate on his own behalf the merits of a controversy which, properly viewed, lies solely between the States, but only to contest the propriety of the particular relief sought against him in case the decision on the merits is against his State. This gives an individual defendant in such a suit between States full opportunity to litigate the only question which concerns him individually as distinguished from the questions which concern him only in common with all the citizens of his State.

In the present instance, there is no showing that the individual defendants have any interest whatever with respect to the contract and its performance other than that of the citizens and taxpayers, generally, of Indiana, an interest which that State in this suit fully represents. The individual defendants have presented no defense

other than that which they seek to make on behalf of their State with respect to the making of the contract by that State and the obligations thereby imposed upon it. The particular relief asked against them is sought only as an incident to the relief which the Commonwealth of Kentucky seeks against the State of Indiana. The individual defendants were made parties solely for the purpose of obtaining an injunction against them restraining the prosecution of the suit in the state court. Such an injunction is not needed, as a decree in this suit would bind the State of Indiana and on being shown would bar any inconsistent proceedings in the courts of that State. As no sufficient ground appears for maintaining the bill of complaint against the individual defendants, it should be dismissed as against them.

The question, then, is as to the case made by the Commonwealth of Kentucky against the State of Indiana. By admitting in its answer that the allegations of the complaint are true, the State of Indiana admits the making of the contract and the authority of its officers to make it under the applicable legislation. Not only are the allegations of fact in the complaint conceded to be true but there is also no dispute as to the legal import of these facts. Instead of presenting any legal ground for contesting the validity of the contract, the State of Indiana expressly asserts in its answer that it believes the contract is valid. There is no suggestion of any inadvertence in the answer. On the contrary it is the deliberate statement of the position of the State of Indiana in the light of the litigation in the state court and of the questions there sought to be raised. The only suggestion of a defense for its failure to perform the contract, that is, what the State of Indiana in its answer characterizes as its "only excuse," is the pendency of this litigation in the state court. The State of Indiana avers that it

does not feel warranted in proceeding in the absence of a final determination establishing its right to proceed under the contract.

It is manifest that if, in accordance with the pleading of each State, the contract for the building of the bridge is deemed to be authorized and valid, the mere pendency of a suit brought by citizens to restrain performance does not constitute a defense. In that aspect, the question would be, not as to a defense on the merits, but whether this Court should withhold a final determination merely because of the fact that such a suit is pending. This question raises important considerations. It can not be gainsaid that in a controversy with respect to a contract between States, as to which the original jurisdiction of this Court is invoked, this Court has the authority and duty to determine for itself all questions that pertain to the obligations of the contract alleged. The fact that the solution of these questions may involve the determination of the effect of the local legislation of either State, as well as of acts of Congress, which are said to authorize the contract, in no way affects the duty of this Court to act as the final, constitutional arbiter in deciding the questions properly presented. It has frequently been held that when a question is suitably raised whether the law of a State has impaired the obligation of a contract, in violation of the constitutional provision, this Court must determine for itself whether a contract exists, what are its obligations, and whether they have been impaired by the legislation of the State. While this Court always examines with appropriate respect the decisions of state courts bearing upon such questions, such decisions do not detract from the responsibility of this Court in reaching its own conclusions as to the contract, its obligations and impairment, for otherwise the constitutional guaranty could not properly be enforced. *Larson* v. *South Dakota*, 278 U. S. 429, 433, and cases there cited. Where the

States themselves are before this Court for the determination of a controversy between them, neither can determine their rights *inter sese,* and this Court must pass upon every question essential to such a determination, although local legislation and questions of state authorization may be involved. *Virginia* v. *West Virginia,* 11 Wall. 39, 56; 220 U. S. 1, 28. A decision in the present instance by the state court would not determine the controversy here.

It is none the less true that this Court might await such a decision, in order that it might have the advantage of the views of the state court, if sufficient grounds appeared for delaying final action. The question is as to the existence of such grounds in this case. The gravity of the situation can not be ignored. The injury to the Commonwealth of Kentucky by the delay in the performance of the contract by the State of Indiana is definitely alleged and expressly admitted. That injury is concededly irreparable—without adequate remedy at law. It is specifically set forth in the agreed statement of facts that "it is of great interest and concern to the States of Indiana and Kentucky and the United States and the citizens thereof generally who will travel said Route 41" (the highway through the States which will be made continuous by the construction of the bridge) "to have as early determination of this litigation as is possible." In these circumstances there would appear to be no adequate ground for withholding the determination of this suit because of objections raised by individuals, merely in their capacity as citizens, voters and taxpayers of Indiana, objections which the State itself declines to sponsor.

It would be a serious matter, where a State has entered into a contract with another State, the validity of the contract not being questioned by either State, if individual citizens could delay the prompt performance which was admittedly important, not only to the com-

plainant State but to the people of both States, merely by bringing a suit. It is not difficult to institute suits, and contracts between States, of increasing importance as interstate interests grow in complexity, would be at the mercy of individuals, if the action of the latter, without more, unsupported by any proper averments on the part of the State itself questioning its obligations, should lead this Court to stay its hand in giving the relief to which the complainant State would otherwise be entitled and of which it stood seriously in need.

On such a record as we have in this case, it is unnecessary for the Court to search the legislation underlying the contract in order to discover grounds of defense which the defendant State does not attempt to assert. The State of Indiana concludes its answer by saying that if a decree goes against it as prayed for, the State will at once proceed with the performance of the contract and fully complete that performance according to its terms.

We conclude that the controversy between the States is within the original jurisdiction of this Court; that the defendant State has shown no adequate defense to this suit; that nothing appears which would justify delay in rendering a decree; and that the Commonwealth of Kentucky is entitled to the relief sought against the State of Indiana.

The complainant and the defendant State will be accorded twenty days within which to submit a form of decree to carry these conclusions into effect. Costs will be divided equally between the States.

Dismissed as to individual defendants.

Decree for complainant against the defendant State.

Syllabus.

WISCONSIN ET AL. *v.* ILLINOIS ET AL.

MICHIGAN *v.* ILLINOIS ET AL.

NEW YORK v. ILLINOIS ET AL.

Nos. 7, 11, and 12, Original. Argued March 12, 13, 1930.—Decided April 14, 1930.

1. Passing upon the Master's report in this case and the exceptions thereto, the Court determines the amounts by which the unlawful diversion of water from Lake Michigan (278 U. S. 367) should be diminished from time to time and the times to be fixed for each step; the plans proposed for disposal of the Chicago sewage are considered as material only as bearing on what those determinations should be; the defendants must find the way to comply with the determinations. P. 197.
2. The performance to be exacted of the defendant State is to be gauged by what is possible if it devotes all its powers to the exigency. The State can base no defences upon difficulties which it has itself created, nor upon anything in its own constitution that may stand in the way of prompt action. *Id.*
3. In determining the extent to which the diversion of water should be reduced and the times at which the reductions should take place, a recent rise in the level of Lake Michigan cannot be taken into account, since, apart from speculation as to the duration of the rise, delays are allowable only for the purpose of limiting within fair possibility, the requirements of immediate justice pressed by the complaining States. *Id.*
4. These requirements as between the parties are the constitutional rights of those States, subject to whatever modification they may hereafter be subjected to by Congress acting within its authority. *Id.*
5. In present conditions there is no invasion of the authority of Congress by the former decision in these cases; and the right of the plaintiffs to a decree is not affected by the possibility that Congress may take some action in the matter. *Id.*
6. The Court approves the Master's recommendations as to the amounts in which the diversion shall be successively reduced and the times within which the reductions shall be made, with a provision requiring the defendant Sanitary District to file with the Clerk of this Court, at stated periods, reports of the progress of

the work involved, at the coming in of which either party may make application to the Court for such action as may be suitable. P. 198.

7. All action of the parties and the Court in this case will be subject to any order that Congress may make in pursuance of its constitutional powers and any modification that necessity may show should be made by this Court. *Id.*

8. The Court rejects the plaintiffs' demands that all diversion through the Drainage Canal cease, that the canal be closed at its connection with the Des Plaines River, with an incidental return of the flow of the Chicago River to its original course into the Lake, and also (a demand not contemplated by their bills) that all water pumped in the Sanitary District for domestic purposes be returned to the Lake after being purified in sewage works, and adopts as more reasonable the Master's report that, as the best way of preventing the pollution of navigable waters, an outflow from the canal into the Des Plaines should be permitted and that the interests of navigation in the Chicago River, as a part of the Port of Chicago, will require the diversion of an annual average not exceeding 1500 c. f. s., in addition to domestic pumpage after sewage treatment. P. 199.

9. The claims of the complaining States should not be pressed to a logical extreme without regard to relative suffering and to the time during which the plaintiffs have let the defendants go on without complaint. P. 200.

10. If the amount of water withdrawn for domestic purposes should be excessive, it will be open to complaint. *Id.*

11. Whether the right for domestic use extends to great industrial plants (not argued) may be open for consideration at some future time. *Id.*

12. The defendants, having made the suits necessary by persisting in unjustifiable acts, must pay the costs of the litigation. *Id.*

Decree directed, subject to future modification.

SUITS brought originally in this Court by the States of Wisconsin, Minnesota, Ohio, Pennsylvania, Michigan, and New York, against the State of Illinois and the Chicago Sanitary District, to enjoin further taking of water from Lake Michigan for the purpose of carrying off the sewage of Chicago and vicinity through a drainage canal. Pursuant to the opinion reported in 278 U. S. 367, the case

was referred for the second time to Charles E. Hughes, Esquire, as Special Master. The Master was directed to take testimony on the practical measures needed to dispose of the sewage without the unlawful diversions of water, and the time required for their completion, and to report his conclusions for the formulation of a decree. The decision now reported was rendered after a hearing upon exceptions to the Master's report under the second reference.

Messrs. Raymond T. Jackson, Special Assistant Attorney General of Wisconsin; *Gilbert Bettman,* Attorney General of Ohio; *Wilbur M. Brucker,* Attorney General of Michigan; and *Newton D. Baker,* Special Assistant Attorney General of Ohio; with whom *Messrs. John W. Reynolds,* Attorney General, *Herman L. Ekern,* Special Assistant Attorney General, and *Herbert H. Naujoks,* Assistant Attorney General, of Wisconsin; *Henry N. Benson,* Attorney General of Minnesota; and *Cyrus E. Wood,* Attorney General and *Thomas E. Taylor,* Deputy Attorney General, of Pennsylvania, were on the brief, for the complainant States of Wisconsin, Minnesota, Ohio, Pennsylvania, and Michigan.

No diversion or flow at Lockport is necessary or legally admissible for the purpose of maintaining navigation in the Chicago River as part of the Port of Chicago, or for any other purpose, upon the completion of the program of practical measures.

The Master, in his original report, found that Illinois had no power to divert water from the Great Lakes-St. Lawrence Watershed as against the complainant States, and that finding was confirmed by this Court. 278 U. S. 367. His later conclusion would overrule the previous decision of this Court. It would not only authorize Illinois to withhold its entire natural contribution to the Great Lakes System, but also to abstract from two to five

or six times the amount in addition (depending on whether the domestic pumpage be included). This additional water, contributed by the lower riparian States, would never have been within the boundaries of Illinois except for her unlawful act. No equity to take it can be founded upon a claim that it is or will be useful to the appropriator. It could not be said that the expense which the defendant would save by the appropriation would exceed the damage inflicted upon the complainants. But a State can not justify the taking of waters of another State upon the ground that it can derive a greater profit from their use than could the rightful owner. *Wyoming* v. *Colorado,* 259 U. S. 419. The complainant States need give no reason for keeping their own. *Hudson County Water Co.* v. *McCarter,* 209 U. S. 349.

This Court did not delegate to the Master the discretion or duty to apportion the waters between the complainant States and Illinois, on the basis of use which he might think most beneficial, or on any other basis. His exposition of the basis upon which his conclusion rests demonstrates that it is without legal basis and not responsive to the mandate of re-reference issued by the Court.

The Court held that no diversion was admissible in the interests of sanitation and that the defendants must provide some method of disposing of the sewage other than promoting or continuing the existing diversion. If any diversion were to be justified by reason of or as incident to the disposal of the sewage, the burden was on the defendants to establish both its necessity and extent as an equitable defense *pro tanto.*

This Court expressly held that Congress had not attempted to authorize any diversion for navigation purposes on the Illinois or Mississippi Rivers and that no diversion of water for such purposes could be allowed in this case. The Master has specifically found that there has been no subsequent action by the Congress. The

question, therefore, here to be determined is solely whether on the completion of this program, the diversion of any quantity of water will be required in order to maintain such navigation as may use the Port of Chicago and the Chicago River in connection with the Great Lakes-St. Lawrence System. There is no navigation in any practical sense coming into the Chicago River by way of the Illinois Waterway or the Illinois-Michigan Canal. Only a few canoes and small pleasure craft have passed through the little lock of the Sanitary District.

With the cessation of all flow at Lockport, navigable depths will be increased in the Chicago River and the Drainage Canal because of the reversal of slope incident to restoration of the natural flow into Lake Michigan. The inquiry is then immediately reduced to the question of whether any diversion of water is necessary after completion of this program in order to prevent a nuisance which will obstruct navigation in the Chicago River as part of the Port of Chicago.

With the completion of practical measures recommended by the Master (less control works) or of complainants' program, for the disposition of the sewage without diversion and with no flow at Lockport, no interference with or obstruction in fact to navigation or navigable capacity will be created in the Chicago River as part of the Port of Chicago.

Assuming, solely for the sake of argument, that the Court, in adverting to the possibility of some negligible quantity of diversion being necessary to maintain navigation in the Chicago River, referred not merely to the preservation of adequate depths and widths, but to the prevention of any nuisance conditions arising from the disposal of the sewage which could create an interference with, or obstruction to, navigation or navigable capacity, complainants assume that the Court did not have in mind any fanciful standard for the Chicago River, but intended

simply to secure practical conditions which have been found adequate for navigation in line with the experience in navigable harbors generally.

While defendants originally contended that the discharge of the entire volume of raw sewage into the Chicago River did not create any interference with navigation, ever since this Court held that diversion for sanitation is illegal and inadmissible, defendants have steadily attempted to create an impression that, in order to maintain navigation at Chicago, it is necessary to eliminate all possibility of contamination of the water in the River, no matter how negligible, so that in effect it may be as pure as it was when there was no City of Chicago. If the contentions of the defendants were correct, there would be no free and unobstructed navigation at any of the substantial ports of the United States, and navigation, instead of growing, upon the lakes and elsewhere, would have died out long ago, as the cities continued to grow. On the contrary, it has rapidly increased. Cf. *New York* v. *New Jersey,* 256 U. S. 296.

Analysis of the evidence demonstrates that no diversion is necessary to maintain navigation in the Chicago River.

If it be assumed that the program of practical measures recommended by the Master is not adequate to prevent interference with navigation in the Chicago River as part of the Port of Chicago, with no flow at Lockport, then other available practical measures must be included in the program; and with their inclusion, no claim of a necessity for any diversion to maintain navigation in the Chicago River can be supported.

If an unusual standard of purity and beauty in the interests of navigation is to be adopted for the Chicago River, then there are available practical measures other than diversion for accomplishing such a standard.

Practical measures are available to wholly eliminate the effluent of the sewage treatment works and the discharge

of any untreated sewage at times of storm from the Chicago River, if that is deemed necessary. In any event, no permanent diversion in abridgement of complainants' rights is admissible as a matter of law.

Diversion to remove a nuisance created by the sewage of Chicago is not in aid of navigation.

Congress, by general and special legislation, has affirmatively determined that the discharge of local sewage and street wash into any of the navigable waters of the United States shall not constitute an obstruction to navigation or navigable capacity as a matter of law. U. S. C., Title 33, §§ 407, 421. This determination is conclusive. *Pennsylvania* v. *Wheeling Bridge Co.,* 18 How. 421; *Southern Pacific Co.* v. *Olympian Dredging Co.,* 260 U. S. 205. It seems that, in *New York* v. *New Jersey,* 256 U. S. 296, this statute was not construed.

If the Court should find that there is any basis in fact for any diversion, subsequent to the completion of the program of practical measures, in the interests of navigation, complainants reassert their contentions (laid aside without decision in the opinion of January 14, 1929) that neither the State of Illinois nor the Federal Government has the power to authorize the diversion of any water in the Great Lakes-St. Lawrence Watershed to the Mississippi Watershed without the consent of the complainant States.

The City of Chicago does not divert the unconsumed portion of its domestic pumpage; it would have no legal right so to do against the objection of these complainants; and if such a right be conceded for the sake of argument, such a diversion could not be made the basis of diverting an additional quantity of water in derogation of the rights of the complainants.

Domestic pumpage does not cease to be water because it has become in a greater or lesser degree contaminated through its reasonable use for domestic purposes.

The State of Illinois under the circumstances of this case has not the power to authorize Chicago to take its domestic water supply from the Great Lakes Watershed and divert the unconsumed portion to the Mississippi Watershed. *Holyoke Water Power Co.* v. *Connecticut River Co.*, 22 Blatch. 131, 20 Fed. 71; *Saunders* v. *Bluefield Imp. Co.*, 58 Fed. 133; *Pine* v. *New York*, 50 C. C. A. 145, 112 Fed. 98, reversed on other grounds, 185 U. S. 93; *Rutz* v. *St. Louis*, 7 Fed. 438; *Hoge* v. *Eaton*, 135 Fed. 411.

The common law of waters obtains in the complainant and defendant States. Every riparian owner is entitled to the natural flow of the stream or watercourse without substantial diminution in either quantity or quality, and an upper riparian owner must return any waters diverted from a watercourse before it leaves his land. *Kimberly & Clark Co.* v. *Hewitt*, 79 Wis. 334; *Priewe* v. *Wisconsin Land & Imp. Co.*, 93 Wis. 534; *Dwight* v. *Hayes*, 150 Ill. 237; *Minnesota Loan & T. Co.* v. *St. Anthony Falls Waterpower Co.*, 82 Minn. 505; *Pinney* v. *Luce*, 44 Minn. 367; *Clark* v. *Pennsylvania R. Co.*, 145 Pa. St. 438; *Miller* v. *Miller*, 9 Pa. 74; *Strobel* v. *Kerr Salt Co.*, 164 N. Y. 303; *Loranger* v. *Flint*, 185 Mich. 454; *Stock* v. *Jefferson*, 114 Mich. 357; *Canton* v. *Shock*, 66 Oh. St. 19; *Stock* v. *Hillsdale*, 155 Mich. 375; *Philadelphia* v. *Collins*, 68 Pa. St. 106; *Haupt's Appeal*, 125 Pa. St. 211; *Lord* v. *Meadville Water Co.*, 135 Pa. 122; *Crill* v. *Rome*, 47 How. Pr. Rep. 398; *Sumner* v. *Gloversville*, 71 N. Y. S. 1088; *Smith* v. *Rochester*, 92 N. Y. 463; *Fulton Light, H. & P. Co.* v. *State*, 200 N. Y. 400; *Minneapolis Mill Co.* v. *Water Comm'n*, 56 Minn. 485; *Kimberly & Clark Co.* v. *Hewitt*, 79 Wis. 334; *Green Bay & Co.* v. *Kaukauna Water Co.*, 90 Wis. 370; *Elgin* v. *Elgin Hydraulic Co.*, 85 Ill. App. 182, affirmed, 194 Ill. 476.

The Master committed no error in not allowing a longer period of time for the construction and placing in operation of the practical measures recommended by him.

This Court has already decided, *Wisconsin* v. *Illinois,* 278 U. S. 367, that it has the jurisdiction to determine the extent of diversion, if any, which is legal, and its right so to do is clear.

The Master should have recommended that costs be taxed against the defendants, including the fees of the Master. *Nebraska* v. *Iowa,* 143 U. S. 359; *South Dakota* v. *North Carolina,* 192 U. S. 286; *New York* v. *New Jersey,* 256 U. S. 296; *North Dakota* v. *Minnesota,* 263 U. S. 583.

Mr. Hamilton Ward, Attorney General of New York, submitted for the complainant State of New York.

The program outlined by the Master is not an adequate program of practical measures for the disposition of the sewage in the Sanitary District through other means than lake diversion, as interpreted by the Master, and does not comply with the order of this Court dated January 14, 1929.

The inclusion by the Master of controlling works as a part of his program of practical measures for the disposition of sewage was erroneous because it preserves rather than prevents diversion and because it conditions complainant's relief upon the discretion of the Secretary of War.

Upon the completion of the sewage disposal program, no diversion or flow at Lockport is necessary or legally admissible to maintain navigation in the Chicago River as part of the Port of Chicago.

Diversion is not necessary in the interests of navigation on the Chicago River as a part of the Great Lakes system.

Upon completion of the practical measures recommended by the Master, or of complainant's program, there will be no nuisance in the Chicago River such as to require the diversion of any lake water.

In *New York* v. *New Jersey*, 256 U. S. 296, the discharge of sewage into New York Harbor with only simple preliminary treatment for the removal of gross material was held not to be harmful to navigation.

Congress by general and special legislation has affirmatively determined that the discharge of local sewage and street wash into any of the navigable waters of the United States shall not constitute an obstruction of navigation or navigable capacity as a matter of law, U. S. C., Title 33, §§ 407, 421. This is conclusive. *Monongahela Bridge Co.* v. *United States*, 216 U. S. 177.

The time allowed by the Master for the construction and placing in operation of practical measures for sewage disposal is sufficient.

The jurisdiction of this Court to fix the amount of diversion in the interest of navigation has been decided. *Wisconsin* v. *Illinois*, 278 U. S. 376.

The Master was correct in not allowing additional diversion in the alleged interest of navigation in the Illinois River or Michigan Canal, and in finding it practicable to determine permissible reductions in diversion during the construction.

The decree proposed should have awarded costs to the complainant including the fees of the Master. *North Dakota* v. *Minnesota*, 263 U. S. 583.

Messrs. John W. Davis, James M. Beck and *Edmund D. Adcock*, with whom *Messrs. Oscar E. Carlstrom*, Attorney General of Illinois, *Walter E. Beebe, George F. Barrett, James Hamilton Lewis, Louis J. Behan, William P. Sidley* and *Cornelius Lyndè* were on the brief, for the defendants, the State of Illinois and the Sanitary District of Chicago.*

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* *Mr. Carlstrom* appeared as representing the State of Illinois; *Mr. Beebe* as Attorney, and *Messrs. Barrett* and *Adcock* as Solicitors, of the Sanitary District of Chicago. *Messrs. Davis, Beck, Lewis,* and

The manner and conditions of the discharge and flow of wastes in the navigable waters must be within the paramount power of Congress to regulate. Congress has provided for regulation by the Secretary of War on the recommendation of the Chief of Engineers. It would be improper for the Court to step over into this field of the political department.

The bills do not seek to interfere with the discharge of Chicago's sewage, wastes and storm water to the Des Plaines River.

Pursuant to these bills, much evidence was offered by complainants at the 1926–27 hearings, and their witnesses at those hearings never contemplated discharge of treated or untreated sewage and storm waters into Lake Michigan.

This Court's opinion of January 14, 1929, does not contemplate preventing discharge of sewage effluent, waste, storm water and rain water run-off to the Des Plaines River, nor does it intend that diversion from the Lake should cease. The Court understood that the only question involved was as to the amount of water that should be "directly abstracted from Lake Michigan."

The City of Chicago has the right to take water from Lake Michigan for its domestic purposes and discharge the drainage, sewage or effluent or wastes from sewage purification works wherever in its judgment it may deem most appropriate.

The Supreme Court, in original suits between States, adopts the law of the complainants and defendants as announced by Constitution, statute, or the opinions of their courts. *Wyoming* v. *Colorado,* 206 U. S. 46.

Behan appeared as counsel for the Sanitary District, as did also *Messrs. Sidley* and *Lynde,* the last two representing the Association of Commerce of Chicago.

Mr. Lewis was present at the argument, but yielded his time to *Mr. Adcock.*

The law of the complainant and defendant States is that a city located upon a public navigable waterway has the right to take water for its domestic purposes and appropriate it for all the uses to which the city may put it, such as drinking, cooking, sanitary, manufacturing, fire department and such like, either as riparian owner or by virtue of a grant by the State of such use of public waters, and no lower or other riparian owner can complain of such use for domestic purposes. *City of Canton* v. *Shock,* 66 Ohio 19; *Minneapolis Mill Co.* v. *Board of Water Comm'rs,* 56 Minn. 485; *Lamprey* v. *Minnesota,* 52 Minn. 181; *Loranger* v. *City of Flint,* 185 Mich. 454; *Appeal of Frank Haupt,* 125 Pa. St. 211; *Philadelphia* v. *Collins,* 68 Pa. 106; *Philadelphia* v. *Comm'rs of Spring Garden,* 7 Pa. 348; *Filbert* v. *Dechert,* 22 Pa. Sup. Ct. 362; *Palmer Water Co.* v. *Lehighton Water S. Co.,* 280 Pa. St. 492; *Boalsburg Water Co.* v. *State College Water Co.,* 240 Pa. St. 198; *Scranton Gas & W. Co.* v. *D. L. & W. R. Co.,* 240 Pa. St. 604; *Crill* v. *The City of Rome,* 47 How. Prac. Rep. 398; *Illinois Central R. Co.* v. *Illinois,* 146 U. S. 387; *Strobel* v. *Kerr Salt Co.,* 164 N. Y. 303; *United P. B. Co.* v. *Iroquois P. & P. Co.,* 226 N. Y. 38; *Haseltine* v. *Case,* 46 Wis. 391; *State* v. *Southerland,* 166 Wis. 511; *Metropolitan Investment Co.* v. *Milwaukee,* 165 Wis. 216; *Thomas Furnace Co.* v. *Milwaukee,* 156 Wis. 549; *Wisconsin River Imp. Co.* v. *Lyons,* 30 Wis. 61; *Diana Shooting Club* v. *Husting,* 156 Wis. 261; *City of Elgin* v. *Elgin Hydraulic Co.,* 85 Ill. App. 182; *Watuppa Reservoir Co.* v. *Fall River,* 147 Mass. 548; *Fisk* v. *Hartford,* 69 Conn. 375; *City of Auburn* v. *Union Water Power Co.,* 90 Me. 576; *Barre Water Co.* v. *Carnes,* 65 Vt. 626.

Diversions of water from one watershed to another have been the common practice of complainant States. These diversions have been acquiesced in and were undoubtedly made for the purpose of taking advantage of the natural

resources of the States making the diversions. See *Wyoming* v. *Colorado*, 259 U. S. 419, 466.

The Acts of Congress of 1822 and 1827, and the Acts of Illinois, have brought Chicago within the watershed of the Mississippi River, at least for the purpose of discharging the run-off of the Chicago River drainage area and sewage. *Missouri* v. *Illinois*, 200 U. S. 496.

Since about 1865, there has been discharged to the Des Plaines River by way of the Illinois and Michigan Canal, or the Sanitary and Ship Canal, and from the Chicago River, an amount of sewage and water equal to the average rain water run-off of the Chicago River drainage area and the sewage and wastes.

After the works recommended in the Master's report for the treatment of sewage and wastes have been installed, then there will have been disposed of and eliminated all the sewage and wastes that may be so disposed of from a practicable standpoint. There will be left a residue of wastes in the effluents and in the storm water after such works are put in operation. Therefore, a reasonable amount of water will be required and may be diverted from Lake Michigan to prevent nuisance to or interference with navigation or navigable waters in the port and harbor of Chicago and in Lake Michigan, to prevent pollution and impairment of the domestic water supply, and bathing beaches, and to prevent other nuisances.

The Court in exercising its jurisdiction in controversies between States, will apply the principle of comity and equality of right and opportunity and such equitable principles as will effect a just and equitable solution of the problem under all the circumstances of the case.

Equality of right does not mean an equal division of water. The States stand on an equal level or plane. Each State has the right to take advantage of what nature

has by reason of its topography, natural resources and other advantages provided it, even though in putting such resources to the best available uses, the State may encroach to some extent upon the solitary rights or the equally full enjoyment of rights of some other State or States. Each State has an equal right to use those great natural assets which are available to many States in common, and in appropriating part is not to be limited by technical or narrow rules. Thus generally the public welfare of the people of all the States will be advanced.

The discharge of the effluent and storm water, together with a reasonable amount of water direct from Lake Michigan, to the Des Plaines River, constitutes the natural and logical method of disposing of these wastes and protecting navigation.

The ordinary rain water run-off of the Calumet and Chicago River drainage areas must necessarily become mixed with and a part of the sewage. In any event, this ordinary rain water run-off has been discharged to the Des Plaines River since 1865. In this there has been such long acquiescence that there can be no possibility of complaint. The amount of water required from Lake Michigan to protect navigation is small, and the effect, if any, upon the interests of complainant States, is negligible in comparison with the great financial burden that would be placed upon the people of Chicago, and the inconveniences from nuisance to the people living at Chicago, as well as to the persons navigating the Lakes. *Kansas* v. *Colorado,* 206 U. S. 46; *North Dakota* v. *Minnesota,* 263 U. S. 365; *Wyoming* v. *Colorado,* 259 U. S. 419; *Minnesota Rate Cases,* 230 U. S. 352; *Kansas* v. *Colorado,* 185 U. S. 125.

The recent Colorado River compact is excellent authority in support of the doctrine of equal right and opportunity between States, and becomes a persuasive

precedent in applying interstate law principles in controversies between the States.

The discharge into Lake Michigan of effluent from treatment plants, storm water, untreated sewage therein and drainage, as complainants propose, would forever impair Chicago's only water supply.

The practicable measures required for the disposition of the sewage and wastes of the Sanitary District, do not embrace the additional works which the complainants now insist should have been included by the Master.

The diversion from Lake Michigan, when all the sewage treatment works are in operation, should be fixed with relation to the needs and interest of navigation not only of the port and harbor of Chicago, but also of the Des Plaines and Illinois Rivers. *Wisconsin* v. *Illinois*, 278 U. S. 367; *New York* v. *New Jersey*, 256 U. S. 296.

Considering the interests of navigation on the Illinois River, as well as that at the port of Chicago, the evidence is undisputed that approximately 5,000 c. f. s. of diversion, including domestic pumpage, is required to maintain unobjectionable conditions on the Illinois River.

Considering only the waters of the port of Chicago, 2,000 c. f. s., in addition to domestic pumpage and rain water run-off is required for navigation.

The modern trend of thought, congressional legislation, and official action of government and state officers is toward keeping and maintaining navigable and other waters of the United States free from future pollution by sewage and waste contamination of cities. *Missouri* v. *Illinois*, 200 U. S. 496; *New York* v. *New Jersey*, 256 U. S. 296.

The provision for controlling works to prevent reversals of the Chicago River into the Lake, is part of the defendants' construction program to provide practical measures in order that the amount of water diverted from the Lake, when all the works are in operation, may be reduced to

the lowest practicable amount consistent with the interests of navigation and prevention of nuisance to the various interests involved.

Unless such controlling works are installed, it will be impracticable, as the Master found, to reduce the diversion below 6,500 cubic second feet.

The drainage canal and the Chicago River are navigable waters of the United States, and it will be necessary before such controlling works may be installed, that the plans therefor be approved by the Secretary of War, on the recommendation of the Chief of Engineers, under § 10 of the Rivers and Harbors Act of March 3, 1899. *Mortell* v. *Clark,* 272 Ill. 201; *People* v. *Economy Power & L. Co.,* 241 Ill. 329; *Ex parte Boyer,* 109 U. S. 628; *United States* v. *Cress,* 243 U. S. 316; *Perry* v. *Haines,* 191 U. S. 17; *DuPont* v. *Miller,* 310 Ill. 140.

The Master has found that such controlling works will not materially interfere with navigation, and has provided by his form of decree that the defendant Sanitary District shall immediately submit plans to the War Department for such control works and that the control works shall be constructed and installed by the Sanitary District within two years after the date of the approval of such plans by the War Department. Consequently, an exception on any prognosis that they may not be built is without merit.

The amounts of the diversion at various times during the period of construction, and the amount after all the works are completed, should be fixed by the Secretary of War, on the recommendation of the Chief of Engineers.

The opinion of January 14, 1929, intends that the Secretary of War, on the recommendation of the Chief of Engineers, shall continue the exercise of the functions heretofore exercised in fixing the amounts of the diversions in the interests of navigation and its protection as the exigencies of the situation may prompt.

The Court ought not to take any action in fixing the amount of the diversion which will invade the sphere of action of the political department. The Court's opinion of January 14, 1929, must not be so construed and, if it may bear such construction, it should be modified. *Sanitary District* v. *United States,* 266 U. S. 405; *Pacific Tel. Co.* v. *Oregon,* 223 U. S. 118; *Prentis* v. *Atlantic Coast Line,* 211 U. S. 210.

It is impracticable now to fix amounts of the diversion. The practical solution is to provide by the decree that the diversion shall be, during the construction period, such amounts as may be determined by permits issued according to law by the Secretary of War on the recommendation of the Chief of Engineers; but that such permits shall be subject to review by this Court on the evidence already submitted and any further evidence that may then be presented.

The time fixed by the Master's report for the installation of all the different works is too short.

The rise in lake levels since the introduction of the evidence on which the Court's opinion of January 14, 1929, was rendered, should have caused the Master to disregard his conclusion that the Court intended to impose "an immediately heavy burden" in the installation of works. Reasonable time for completion should have been allowed. The shorter time which would impose such immediately heavy burden is inequitable under the circumstances.

Liberal allowance for unforeseeable delays in the construction of such vast and unusual works, should have been made, which would have extended the construction period beyond the date fixed by the Master.

It is inappropriate at this time to determine which one of the parties shall pay the costs. Cf. *North Dakota* v. *Minnesota,* 263 U. S. 583; *Kansas* v. *Colorado,* 206 U. S. 46; *Wyoming* v. *Colorado,* 259 U. S. 496.

Messrs. Stratton Shartel, Attorney General of Missouri, *J. W. Cammack,* Attorney General of Kentucky, *Charles H. Thompson,* Attorney General of Tennessee, *Percy Saint,* Attorney General of Louisiana, *Rush H. Knox,* Attorney General of Mississippi, *Hal L. Norwood,* Attorney General of Arkansas, and *Daniel N. Kirby,* on behalf of the Mississippi Valley States, intervening defendants, joined in the foregoing brief.

MR. JUSTICE HOLMES delivered the opinion of the Court.

These suits, brought to prevent the State of Illinois and the Sanitary District of Chicago from continuing to withdraw water from Lake Michigan as they now are doing, have passed through their first stage in this Court. The facts were set forth in detail and the law governing the parties was established by the decision reported in 278 U. S. 367. It was decided that the defendant State and its creature the Sanitary District were reducing the level of the Great Lakes, were inflicting great losses upon the complainants and were violating their rights, by diverting from Lake Michigan 8,500 or more cubic feet per second into the Chicago Drainage Canal for the purpose of diluting and carrying away the sewage of Chicago. The diversion of the water for that purpose was held illegal, but the restoration of the just rights of the complainants was made gradual rather than immediate in order to avoid so far as might be the possible pestilence and ruin with which the defendants have done much to confront themselves. The case was referred a second time to the master to consider what measures would be necessary and what time required to effect the object to be attained. The master now has reported. Both sides have taken exceptions, but, as we shall endeavor to show, the issues open here are of no great scope.

The defendants have submitted their plans for the disposal of the sewage of Chicago in such a way as to diminish so far as possible the diversion of water from the Lake. In the main these plans are approved by the complainants. The master has given them a most thorough and conscientious examination. But they are material only as bearing on the amount of diminution to be required from time to time and the times to be fixed for each step, and therefore we shall not repeat the examination. It already has been decided that the defendants are doing a wrong to the complainants and that they must stop it. They must find out a way at their peril. We have only to consider what is possible if the State of Illinois devotes all its powers to dealing with an exigency to the magnitude of which it seems not yet to have fully awaked. It can base no defences upon difficulties that it has itself created. If its constitution stands in the way of prompt action it must amend it or yield to an authority that is paramount to the State.

The defendants' exceptions deal with the extent to which the diversion of water should be reduced and to the time at which the reductions should take place. They argue that a recent rise in the level of Lake Michigan should be taken into account. This cannot be done. Apart from the speculation involved as to the duration of the rise, there is a wrong to be righted, and the delays allowed are allowed only for the purpose of limiting, within fair possibility, the requirements of immediate justice pressed by the complaining States. These requirements as between the parties are the constitutional right of those States, subject to whatever modification they hereafter may be subjected to by Congress acting within its authority. It will be time enough to consider the scope of that authority when it is exercised. In present conditions there is no invasion of it by the former decision of this Court, as urged by the defendants. The

right of the complainants to a decree is not affected by the possibility that Congress may take some action in the matter. See *Southern Utilities Co.* v. *Palatka,* 268 U. S. 232, 233. *Kansas* v. *Colorado,* 206 U. S. 46, 117.

The master finds that, on and after July 1, 1930, the diversion of water from Lake Michigan should not be allowed to exceed an annual average of 6,500 cubic feet per second in addition to what is drawn for domestic uses. He finds that when the contemplated controlling works are constructed that are necessary for the purpose of preventing reversals of the Chicago River at times of storm and the introduction of storm flow into Lake Michigan, works that will require the approval of the Secretary of War and that the master finds should be completed and put in operation within two years after the approval is given, and probably by December 31, 1935, the diversion should be limited to an annual average of 5,000 c. f. s. "in addition to domestic pumpage." On this point we deal only with the amount and the time. When the whole system for sewage treatment is complete and the controlling works installed he finds that the diversion should be cut down to an annual average of 1,500 c. f. s. in addition to domestic pumpage. This, he finds, should be accomplished on or before December 31, 1938; and the full operation of one of the contemplated works, the West Side Sewage Treatment Plant, which would permit a partial reduction of the diversion, is to be not later than December 31, 1935. These recommendations are subject to the appointment of a commission to supervise the work, or, better in our opinion, to the filing with the clerk of this Court, at stated periods, by the Sanitary District, of reports as to the progress of the work, at the coming in of which either party may make application to the Court for such action as may seem to be suitable. All action of the parties and the Court in this case will be subject, of course, to any order that Congress may

make in pursuance of its constitutional powers and any modification that necessity may show should be made by this Court. These recommendations we approve within the limits stated above, and they will be embodied in the decree. The defendants argue for delay at every point but we have indicated sufficiently why their arguments cannot prevail. The master was as liberal in the allowance of time as the evidence permitted him to be.

The exceptions of the complainants go mainly to a point not yet mentioned. The sewage of Chicago at present is discharged into a canal that extends to Lockport on the Des Plaines River, (which flows into the Illinois, which in its turn flows into the Mississippi,) from Wilmette on the north and a point on the Lake near the boundary line of Indiana on the south, with another intake midway between these two at the mouth of the Chicago River, which has been reversed from its former flow into Lake Michigan to a flow from the Lake. The change is narrated at length in the former decision of this case. 278 U. S. 367, 401, *et seq.* See also *Missouri* v. *Illinois,* 180 U. S. 208, 211, *et seq.* s. c. 200 U. S. 496. It is partially to oxidize and carry off this sewage that the main diversion of water is made. The complainants demand that this diversion cease, and the canal be closed at Lockport, with an incidental return of the Chicago River to its original course. They also argue that what is called the domestic pumpage after being purified in the sewage works be returned to the Lake. These demands seem to us excessive upon the facts in this case. The master reports that the best way of preventing the pollution of navigable waters is to permit an outflow from the Drainage Canal at Lockport, and that the interests of navigation in the Chicago River as a part of the port of Chicago will require the diversion of an annual average of from 1,000 c. f. s. to 1,500 c. f. s. in addition to domestic pumpage after the sewage

treatment program has been carried out. The canal was opened at the beginning of the century, thirty years ago. In 1900 it already was a subject of litigation in this Court. The amount of water ultimately to be withdrawn unless Congress may prescribe a different measure is relatively small. We think that upon the principles stated in *Missouri* v. *Illinois*, 200 U. S. 496, 520, *et seq.*, the claims of the complainants should not be pressed to a logical extreme without regard to relative suffering and the time during which the complainants have let the defendants go on without complaint.

Perhaps the complainants would not be very insistent with regard to the 1,000 or 1,500 c. f. s. which earlier in this case they seemed to admit to be reasonable, if their demand were allowed that the domestic pumpage be purified and returned to the Lake—a demand not contemplated by their bill. But purification is not absolute. How nearly perfect it will be with the colossal works that the defendants have started is somewhat a matter of speculation. The master estimates that with efficient operation the proposed treatment should reach an average of 85 per cent purification and probably will be 90 per cent or more. Even so we are somewhat surprised that the complainants should desire the effluent returned. The withdrawal of water for domestic purposes is not assailed by the complainants and we are of opinion that the course recommended by the master is more reasonable than the opposite demand. If the amount withdrawn should be excessive, it will be open to complaint. Whether the right for domestic use extends to great industrial plants within the District has not been argued but may be open to consideration at some future time.

We see no reason why costs should not be paid by the defendants, who have made this suit necessary by persisting in unjustifiable acts. *North Dakota* v. *Minnesota*, 263 U. S. 583.

A decree will be entered to the effect that, subject to such modifications as may be ordered by the Court hereafter,

1. On and after July 1, 1930, the defendants, the State of Illinois and the Sanitary District of Chicago, are enjoined from diverting any of the waters of the Great Lakes-St. Lawrence system or watershed through the Chicago Drainage Canal and its auxiliary channels or otherwise in excess of an annual average of 6,500 c. f. s. in addition to domestic pumpage.

2. That on and after December 31, 1935, unless good cause be shown to the contrary the said defendants are enjoined from diverting as above in excess of an annual average of 5,000 c. f. s. in addition to domestic pumpage.

3. That on and after December 31, 1938, the said defendants are enjoined from diverting as above in excess of the annual average of 1,500 c. f. s. in addition to domestic pumpage.

4. That the provisions of this decree as to the diverting of the waters of the Great Lakes-St. Lawrence system or watershed relate to the flow diverted by the defendants exclusive of the water drawn by the City of Chicago for domestic water supply purposes and entering the Chicago River and its branches or the Calumet River or the Chicago Drainage Canal as sewage. The amount so diverted is to be determined by deducting from the total flow at Lockport the amount of water pumped by the City of Chicago into its water mains and as so computed will include the run-off of the Chicago and Calumet drainage area.

5. That the defendant the Sanitary District of Chicago shall file with the clerk of this Court semi-annually on July first and January first of each year, beginning July first, 1930, a report to this Court adequately setting forth the progress made in the construction of the sewage treatment plants and appurtenances outlined in the program as proposed by the Sanitary District of Chicago, and also

setting forth the extent and effects of the operation of the sewage treatment plants, respectively, that shall have been placed in operation, and also the average diversion of water from Lake Michigan during the period from the entry of this decree down to the date of such report.

6. That on the coming in of each of said reports, and on due notice to the other parties, any of the parties to the above entitled suits, complainants or defendants, may apply to the Court for such action or relief, either with respect to the time to be allowed for the construction, or the progress of construction, or the methods of operation, of any of said sewage treatment plants, or with respect to the diversion of water from Lake Michigan, as may be deemed to be appropriate.

7. That any of the parties hereto, complainants or defendants, may, irrespective of the filing of the above-described reports, apply at the foot of this decree for any other or further action or relief, and this Court retains jurisdiction of the above-entitled suits for the purpose of any order or direction, or modification of this decree, or any supplemental decree, which it may deem at any time to be proper in relation to the subject matter in controversy.

The CHIEF JUSTICE took no part in the consideration or decision of these cases.

UNITED STATES *v.* ADAMS.

SAME *v.* SAME.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF ARKANSAS.

Nos. 281 and 282. Argued March 6, 1930.—Decided April 14, 1930.

1. Under Rev. Stats. § 5209, as amended; U. S. C., Title 12, § 592; which punishes any officer of a federal reserve or member bank

who makes any false entry in any book or report of the bank with intent to defraud or deceive, etc., two entries on a bank's books referring to the same transaction, based upon the same draft and which were the correlated means of accomplishing a single fraud, are not separately punishable as separate offenses. P. 204.

2. The offense under this section of making a false entry in a report of condition of a bank, showing a credit, is distinct from the offense of making an earlier false entry on its books, showing the same credit. P. 205.

3. In a prosecution under this section for making a false entry of credit in a report of the bank's condition, with intent to defraud and deceive, a former acquittal upon a charge of making with like intent earlier entries of the same credit on the bank's books, is not a bar, since the acquittal, though it establishes that the book entries were not made with criminal intent, does not establish that they were true, and *non constat* but that the accused may have learned of their falsity after entering them on the books and before making the report. P. 205.

No. 281 affirmed.

No. 282 reversed.

APPEALS from judgments of the District Court sustaining pleas of former acquittal in bar of two indictments, one charging that the appellee made a false entry on a book of a bank of which he was president, and the other that he made a false entry in a report of its condition.

Assistant Attorney General Sisson, with whom *Assistant Attorney General Luhring,* and *Messrs. George C. Butte* and *Harry S. Ridgely* were on the briefs, for the United States.

Mr. T. H. Caraway for Adams.

MR. JUSTICE HOLMES delivered the opinion of the Court.

The defendant was indicted for a false entry in a book of a bank of which he was president, and which was a member of the Federal reserve system. The entry imported that he had made a deposit of $75,000 to the

credit of himself and sons, which it is averred that he had not made. The book was a ledger showing the account of D. D. Adams & Sons, among others, with the bank. The defendant pleaded a former acquittal. The previous indictment was for a false entry in another book of the bank known as the journal ledger and daily balance book, and imported a remittance of $75,000 to another bank to the credit of the defendant's own for which the defendant took credit as above stated. This remittance was a draft for $75,000 which it was alleged that Adams was not entitled to draw. The two entries had reference to the same transaction, were based upon the same draft and were the correlated means of accomplishing a single fraud if fraud there had been. The District Court held that on its construction of Rev. Sts. § 5209, as amended by the Act of September 26, 1918, c. 177, § 7, 40 Stat. 967, 972; U. S. C., Title 12, § 592, there could be but one prosecution for false entries based upon any single draft, even though several different entries were made in the different books of the bank, all relating to the same. Therefore it sustained the plea. The United States appealed.

It is a short point. The statute punishes any officer of a Federal reserve bank who makes any false entry in any book of the bank with intent, &c. The Government contends for the most literal reading of the words, and that every such entry is a separate offense to be separately punished. But we think that it cannot have been contemplated that the mere multiplication of entries, all to the same point and with a single intent, should multiply the punishment in proportion to the complexity of the bookkeeping. The judgment in this case is affirmed.

The second case presents a more delicate question than the previous one, although it was thought by the District Court to come under the same principle. This indictment is for a false entry in a report of conditions of the defendant's bank showing as due from banks other

than Federal reserve banks $138,409.52 instead of the true sum $91,284.27. The plea of former acquittal we take as intended to allege that the difference was made by three items in respect of which the defendant had been indicted for false entries in the books of the bank, of a similar character to those in the other case, with intent to defraud the bank and the examiners appointed to examine its affairs. On this indictment also the defendant was acquitted. It is obvious that technically the plea was bad because the offense alleged was a different offense. The report is not an entry in the books of the bank and does not purport to be a mere transcript of entries. It is a present affirmation as to the resources of the bank—a document different from the books of the bank and having a different purpose. But although not technically a former acquittal, the judgment was conclusive upon all that it decided. *United States* v. *Oppenheimer,* 242 U. S. 85. It establishes that at the time of making the entries, the defendant was not guilty of an intent to defraud the bank or the examiners. It does not establish that the entries were true, although that might have been a ground for the verdict. *Washington, Alexandria & Georgetown Steam Packet Co.* v. *Sickles,* 5 Wall. 580. *De Sollar* v. *Hanscome,* 158 U. S. 216, 221, 222. An alternative possible ground is that although the entries were untrue the defendant believed them to be true or for some reason believed them to be justified. However unlikely it may be that there was a different intent at the time of the later act from that with which the entries were made in the books of the bank, it is entirely possible that the defendant supposed himself to be acting lawfully at the earlier moment, but that he had acquired more accurate knowledge before he signed the report, that he then knew that it was false and was guilty then although not before.

281. Judgment affirmed.

282. Judgment reversed.

WILBUR, SECRETARY OF THE INTERIOR, *v.* UNITED STATES EX REL. KADRIE ET AL.

CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 77. Argued January 10, 13, 1930.—Decided April 14, 1930.

1. Mandamus is employed to compel performance of a ministerial duty and also to compel action in matters involving judgment and discretion, but not to direct the exercise of judgment or discretion in a particular way nor to direct the retraction or reversal of action already taken in the exercise of either. P. 218.
2. When the duty of the Secretary of the Interior or other executive officer, in the administration of statutes, is in a particular situation so plainly prescribed as to be free from doubt and equivalent to a positive command, it is regarded as being so far ministerial that the performance may be compelled by mandamus. *Id.*
3. But when the duty is not thus plainly prescribed, but depends upon a statute or statutes the construction or application of which is not free from doubt, it is regarded as involving the character of judgment or discretion that cannot be controlled by mandamus. *Id.*
4. The Act of January 14, 1889, provided, *inter alia*, that the money derived from the disposal thereunder of lands of the Chippewa Indians in Minnesota, should, after making certain deductions, be placed at interest in the Treasury of the United States to the credit of those Indians; that part of the interest should be paid annually to the Indians in equal shares *per capita*, and the remainder be devoted, under the direction of the Secretary of the Interior, to the establishment and maintenance of free schools among them for their benefit, and that, at the expiration of fifty years, the fund should be divided and paid to the Indians and their issue then living, in equal shares. There were also provisions permitting Congress to appropriate a part of the principal to promoting civilization and support of the Indians and permitting the Secretary of the Interior, during the first five years, to expend interest money of Indians desirous of engaging in farming, in the purchase of livestock, implements, seeds, etc. For its guidance in fixing and paying the annuities, the Department used the original census of the Indians, taken under the Act, and supplementary rolls of its own, eliminating the names of all enrolled Indians who died and adding the names of the living who were entitled to participate and who

were omitted from the census by mistake or were born after it was taken. *Held:*

(1) That a ruling of the Secretary of the Interior placing the children of an enrolled mixed-blood mother on the supplementary rolls upon the ground that they were entitled to annuities notwithstanding that she had abandoned her tribal relationship before the children were born, was a ruling made in the exercise of a continuing administrative authority and subject to be reconsidered by his successor and revoked for the future, if found wrong. *United States* v. *Atkins*, 260 U. S. 220, distinguished. P. 216.

(2) The questions whether the fund is a tribal fund and whether, with the tribe still existing, the distribution of the annuities is to be confined to members of the tribe (with exceptions not here material) are questions involving the exercise by the Secretary of the Interior of judgment and discretion as to which he can not be controlled by mandamus. P. 221.

(3) The continued existence of the tribe, having been recognized by Congress and by the Secretary of the Interior, is not open to question in this case. *Id.*

(4) The time fixed for the final distribution of the fund is so remote that no one is now in a position to ask special relief or direction respecting that distribution. P. 222.

30 F. (2d) 989, reversed.
Supreme Court, D. C., affirmed.

CERTIORARI, 279 U. S. 833, to review a judgment of the Court of Appeals of the District of Columbia, which reversed a ruling of the Supreme Court of the District denying a writ of mandamus.

Assistant Attorney General Richardson, with whom *Messrs. E. C. Finney*, Solicitor, Department of the Interior, and *Pedro Capo-Rodriguez* were on the brief, for petitioner.

Mr. Webster Ballinger for respondents.

MR. JUSTICE VAN DEVANTER delivered the opinion of the Court.

This is a petition for a writ of mandamus commanding the Secretary of the Interior to restore the relators to

the supplemental rolls of the Chippewa Indians in Minnesota and to pay to each of them a per capita share of all future distributions, whether of interest or principal, made from the fund created under section 7 of the act of January 14, 1889, c. 24, 25 Stat. 642.

The writ was denied by the Supreme Court of the District of Columbia, but that ruling was reversed by the Court of Appeals, 30 Fed. (2d) 989, and the matter is here for review on certiorari.

When the act of 1889 was passed the Chippewa Indians in Minnesota comprised eleven bands or tribes occupying ten distinct reservations in that State in virtue of treaties or executive orders. Collectively they were regarded as a single tribe and commonly called the Chippewas of Minnesota.[1] They numbered about 8,300 and their reservations contained approximately 4,700,000 acres. They were tribal Indians, under the guardianship of the United States, and held their reservations as tribal lands. The act of 1889 was directed to accomplishing their transition from the existing tribal relation and dependent wardship to full individual emancipation with its incident rights and responsibilities; and to that end

[1] These Indians formerly were part of the Chippewa or Ojibway Nation of the Great Lakes region. The Nation comprised many subordinate bands or tribes, some of which came to be permanently located in Canada and others in Michigan, Wisconsin, Minnesota and perhaps other States. The bands or tribes which came to be seated in Minnesota have latterly been designated as the Chippewas of Minnesota by way of distinguishing them from those seated elsewhere. Treaties, September 24, 1819, 7 Stat. 203; June 16, 1820, 7 Stat. 206; August 5, 1826, 7 Stat. 290; July 29, 1837, 7 Stat. 536; October 4, 1842, 7 Stat. 591; February 22, 1855, 10 Stat. 1165; March 11, 1863, 12 Stat. 1249; October 2, 1863, 13 Stat. 667; May 7, 1864, 13 Stat. 693; March 19, 1867, 16 Stat. 719; House Doc. Vol. 61, 59th Cong., 1st Sess. pp. 277–280; History of Ojibway Nation, Copway, pp. 170-171; Minn. His. Soc. Cols., Vol. 5, pp. 37-40, 507-509; also, Vol. IX, pp. 55-56.

the act made provision for obtaining, through a commission, a cession of all of their tribal lands save portions of the White Earth and Red Lake reservations needed for allotments; for using the unceded lands in making allotments in severalty, which were to be held subject to prescribed restrictions against alienation, encumbrance and taxation during a period of twenty-five years, or longer if the President so directed; and for selling the ceded lands and creating with the net proceeds an interest-bearing fund, which was to be held in the United States Treasury and expended for the benefit of the Indians as will appear later on.

The act required that the cession have the assent of two-thirds of the male adults and have the approval of the President; directed that the commission obtaining the cession make a census roll of each band or tribe as a guide in ascertaining whether the requisite number of Indians assented to the cession and in making contemplated allotments and payments; required, with exceptions not here material, that the Indians other than those on the Red Lake Reservation be removed to the White Earth Reservation, there to receive allotments; and directed that, after the completion of necessary preliminaries, allotments be made to all of the Indians as soon as practicable.

The contemplated cession was obtained from the Indians and was approved by the President March 4, 1890. The intended census rolls were made and transmitted to the Secretary of the Interior. Several provisions of the act have now been fully executed and others are still in process of administration. The fund created from the proceeds of the sale of the ceded lands is a large one; and the relators here are asserting a right to share in all future distributions therefrom.

The provisions governing the creation and use of that fund are embodied in section 7 of the act and are here

quoted at length—those which the parties emphasize being put in italics.

"Sec. 7. That all money accruing from the disposal of said lands in conformity with the provisions of this act shall, after deducting all the expenses of making the census, of obtaining the cession and relinquishment, of making the removal and allotments, and of completing the surveys and appraisals, in this act provided, be placed in the Treasury of the United States to the credit of all the Chippewa Indians in the State of Minnesota as a permanent fund, which shall draw interest at the rate of five per centum per annum, payable annually for the period of fifty years, after the allotments provided for in this act have been made, and which interest and permanent fund shall be expended for the benefit of said Indians in manner following: *One half of said interest shall, during the said period of fifty years, except in the cases hereinafter otherwise provided, be annually paid in cash in equal shares to the heads of families and guardians of orphan minors for their use; and one-fourth of said interest shall, during the same period and with the like exception, be annually paid in cash in equal shares per capita to all other classes of said Indians; and the remaining one-fourth of said interest shall, during the said period of fifty years, under the direction of the Secretary of the Interior, be devoted exclusively to the establishment and maintenance of a system of free schools among said Indians, in their midst and for their benefit; and at the expiration of the said fifty years, the said permanent fund shall be divided and paid to all of said Chippewa Indians and their issue then living, in cash, in equal shares: Provided,* that Congress may, in its discretion, from time to time, during the said period of fifty years, appropriate, for the purpose of promoting civilization and self-support among the said Indians, a portion of said principal sum, not exceeding five per centum thereof.

The United States shall, for the benefit of said Indians, advance to them as such interest as aforesaid the sum of ninety thousand dollars annually, counting from the time when the removal and allotments provided for in this act shall have been made, until such time as said permanent fund, exclusive of the deductions hereinbefore provided for, shall equal or exceed the sum of three million dollars, less any actual interest that may in the meantime accrue from accumulations of said permanent fund; *the payments of such interest to be made yearly in advance, and, in the discretion of the Secretary of the Interior, may, as to three-fourths thereof, during the first five years be expended in procuring livestock, teams, farming implements, and seed for such of the Indians to the extent of their shares as are fit and desire to engage in farming, but as to the rest, in cash;* and whenever said permanent fund shall exceed the sum of three million dollars the United States shall be fully reimbursed out of such excess, for all the advances of interest made as herein contemplated and other expenses hereunder."

In the negotiations resulting in the cession the commission construed the clauses providing for annual payments of one-half of the interest "in equal shares to the heads of families and guardians of orphan minors" and of one-fourth of the interest "in equal shares per capita to all other classes of said Indians" as meaning that three-fourths of the interest should be paid annually to the Indians in equal shares per capita; and the Secretary of the Interior, in laying the cession before the President for his approval, pronounced that construction reasonable and declared it should be adhered to. H. R. Ex. Doc. No. 247, 51st Cong., 1st Sess., pp. 5–6, 24. For several years payments under those clauses were made on that basis. Then the Secretary of the Treasury submitted to the Comptroller the question whether that basis of payment properly could be continued; and the

Comptroller, after observing that the clauses were obscurely worded, ruled that the construction given to them by the commission had become the true construction through its adoption in actual practice, and should be respected accordingly. 3 Comp. Dec. 158. All subsequent payments have been made, as the prior ones were, in accordance with that construction.

Manifestly some preliminary steps would need to be taken before the interest annuities could be rightly paid. The number of Indians entitled to participate would need to be ascertained so that the per capita share to be paid to each could be calculated; and those so entitled would need to be listed so that the paying tellers would know whom to pay. From the beginning these practical needs have been met by taking the commission's census rolls as a primary guide, eliminating the names of Indians dying after those rolls were made, making supplemental rolls of Indians erroneously omitted from the census rolls and of Indian children entitled to participate but born after the census was taken, and using the two sets of rolls—appropriately brought up to date and made to include only persons in being at the time—as a correct basis for the necessary calculation and listing.

This general statement will open the way for a better appreciation of the special facts and contentions in the present case.

Mary Blair, a full-blood Chippewa woman, was a member of the White Earth band in Minnesota and as such was included in the census rolls and given an allotment on the White Earth Reservation. Sarah Cogger, a daughter of Mary Blair, is of mixed Chippewa and white blood. She was born in 1892, after the census rolls were made, was enrolled on the supplemental rolls soon after her birth, and was recognized as a member of the White Earth band up to the time of her marriage. In 1909 she was married to Mall Kadrie, a Syrian by birth but a

naturalized citizen of the United States. After her marriage she abandoned her tribal relations and ever since has resided with her husband among white people—for several years in Canada and Syria and during the later years at International Falls and St. Paul in Minnesota. She was paid a per capita share in all interest annuities distributed after her enrollment and before her abandonment of the tribal relations, and has received a like share in all subsequent annuities—these later payments to her being in accord with the statutes which save to such an Indian her personal right to share in annuities, tribal funds, etc., as though her tribal relations were maintained.[2]

The nine relators are minor children of Sarah and Mall Kadrie and were born—the first four in Canada and the others at International Falls and St. Paul in Minnesota—after their mother had abandoned her tribal relations and was permanently residing with her husband among white people. So, while all of the relators have a minor fraction of Minnesota Chippewa blood, they were born of parents having no tribal relations then or since and have lived only in white communities.

At their mother's request, following their respective births, the first three of these children were placed on the supplemental rolls and shared in some of the interest annuities. A like request on behalf of the fourth child led to an inquiry which brought attention to the mother's marriage to a white man, her abandonment of the tribal relations and the birth of the four children in Canada where the parents were then residing. With these facts before it the Indian Bureau, in 1916, declined to enroll the fourth child and cancelled the prior enrollment of the first three. Paragraph 4 of section 324 of the Regulations of the Indian Bureau, as amended April 1, 1905, was

[2]Acts March 3, 1875, c. 131, § 15, 18 Stat. 420; February 8, 1887, c. 119, § 6, 24 Stat. 390; August 9, 1888, c. 818, § 2, 25 Stat. 392.

cited as the applicable administrative rule in such matters. That paragraph reads:

"All children born to annuitants either before or since the last preceding payment, who have not already been enrolled, should be enrolled with their parents. This includes cases where the mother is an Indian woman married to a white man, and such woman and her issue are recognized by the tribe as belonging thereto, and where the family so founded identifies itself and affiliates with the tribe of which the mother is a recognized member. When an Indian woman by her marriage with a white man has, in effect, withdrawn from the tribe and is no longer identified with the tribal community and interests, the offspring of such a marriage are not entitled to share in annuities or other benefits as Indians and must not be enrolled."

In 1919 the Secretary of the Interior, following an opinion given by the Solicitor for that Department, ruled that Mrs. Kadrie's children were entitled to share in the interest annuities. The children born up to that time were then placed on the supplemental rolls, and those born thereafter were enrolled soon after birth. All then shared for a time in the annuities. In 1927 a succeeding Secretary of the Interior, adopting and applying an opinion given by a succeeding Solicitor, held that these children were not entitled to share in the interest annuities, and accordingly directed that their enrollment be cancelled and no further payment be made to them.

The two solicitors differed sharply. The first was of opinion that the act of 1889 should be construed and given effect as if it were a conventional deed of trust; and with this as a premise he concluded that the fund established under section 7 is not a tribal fund but one held for designated Indian beneficiaries as individuals, and that the beneficiaries comprise, first, all Indians now living who were included in the census rolls as members

of the tribe, and, secondly, all living lineal descendants of any Indian so enrolled, regardless of whether the descendant is or ever was a member and even though he was born of parents neither of whom was a member at the time. And as the Kadrie children are lineal descendants (grandchildren) of Mary Blair, who was included in the census rolls as a member, that Solicitor regarded them as entitled to share in the distributions.[3] The second Solicitor was of opinion that the act is to be construed and given effect as an exertion by Congress of its authority over the affairs and property of tribal Indians under the guardianship of the United States; that the fund established under section 7 is a tribal fund derived from the sale of tribal lands, and is held and being administered as such by the United States; that the tribe has not been dissolved but is recognized by Congress as still existing; that in this situation the right to share in the interest annuities depends upon existing tribal membership, save in exceptional instances where Congress has provided otherwise; and that the Kadrie children, all of whom were born of a white father and after their mother had separated from the tribe and was permanently living among white people, are without tribal

[3] The Solicitor said:

"The ancestor must be found to have been of the tribal membership at the time of the creation of the trust. . . . His descendants (whether children or grandchildren) take an interest, not as tribal members, but as of the ancestor's blood; his blood entitling him and them alike, because it was tribal blood."

Also:

"Sarah Kadrie and her children are 'issue' of her mother, a full-blood Chippewa Indian duly enrolled, and as such they will be entitled, at the expiration of the trust period, to share in the distribution of the trust fund; and meanwhile they are equally entitled to share in the annuities arising from that fund. Those rights they have not forfeited either by acquiring foreign citizenship or by abandoning, or failing to acquire, residence on the Indian reservation or with the tribe."

membership and not within any exceptional provision permitting other than existing members to share in such annuities. This Solicitor rested his opinion in part upon the general rule that, in the absence of provision to the contrary, the right of individual Indians to share in tribal property, whether lands or funds, depends upon tribal membership, is terminated when the membership is ended, and is neither alienable nor descendible.[4]

In the present petition the relators assert that the decision of the Secretary of the Interior in 1927, although given after notice and hearing, is void in that the then Secretary was without power to reconsider and revoke the decision of his predecessor in 1919 on the same matter; and they further assert that the decision in 1927 is otherwise wrong in that it rests upon untenable rulings to the effect that the fund established under section 7 is a tribal fund and is held and being administered as such by the United States, that the tribe has not been dissolved, and that the right to share in the annuities from the fund is confined to members of the tribe, save in exceptional instances which do not include the relators. Upon these grounds the relators seek a writ of mandamus directing, in substance, that the Secretary of the Interior put aside the decision of 1927 and restore and give effect to that of 1919.

If at the time of the decision in 1927 the Secretary of the Interior was without power to reconsider and revoke the decision of 1919, it well may be that the relators would be entitled to the relief by mandamus which they seek.[5] But there was no such want of power. The de-

[4] *Cherokee Nation* v. *Hitchcock*, 187 U. S. 294, 307; *Gritts* v. *Fisher*, 224 U. S. 640, 642; *Sizemore* v. *Brady*, 235 U. S. 441, 446; *La Roque* v. *United States*, 239 U. S. 62, 66; *Oakes* v. *United States*, 172 Fed. 304, 307.

[5] *United States* v. *Schurz*, 102 U. S. 378, 402–403; *Noble* v. *Union River Logging R. R.*, 147 U. S. 167, 171; *Garfield* v. *Goldsby*, 211 U. S. 249, 261–262.

cision in 1919 was, not a judgment pronounced in a judicial proceeding, but a ruling made by an executive officer in the exertion of administrative authority. That authority was neither exhausted nor terminated by its exertion on that occasion, but was in its nature continuing. Under it the Secretary who made the decision could reconsider the matter and revoke the decision if found wrong; and so of his successor. The latter was charged, no less than the former had been, with the duty of supervising the payment of the interest annuities and of causing them to be distributed among those entitled to them and no others; and if he found that individuals not so entitled were sharing in the annuities by reason of a mistaken or erroneous ruling of the former his authority to revoke that ruling and stop further payments under it was the same as if it had been his own act.[6] The powers and duties of such an office are impersonal and unaffected by a change in the person holding it.

The case of *United States* v. *Atkins*, 260 U. S. 220, relied on by the relators, is not in point. It involved an enrollment by a special commission under a statute providing that the enrollment when approved by the Secretary of the Interior should be "final" and entitle the person enrolled to an allotment. The Secretary approved and in usual course an allotment was made and a patent issued. Thereafter the enrollment was drawn in question in a suit brought to cancel the patent. This Court held that the statute was intended to make the enrollment when approved by the Secretary conclusive of the individual's existence, membership, etc., and unimpeach-

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[6] *West* v. *Standard Oil Co.*, 278 U. S. 200, 210; *Beley* v. *Naphtaly*, 169 U. S. 353, 364; *Knight* v. *U. S. Sand Association*, 142 U. S. 161, 181–182; *New Orleans* v. *Paine*, 147 U. S. 261, 266; *Greenameyer* v. *Coate*, 212 U. S. 434, 442; *Parcher* v. *Gillen*, 26 L. D. 34, 43; *Aspen Consolidated Mining Co.* v. *Williams*, 27 L. D. 1, 10–11. And see *Pearsons* v. *Williams*, 202 U. S. 281, 284–285.

able except for such fraud or mistake as would afford ground for avoiding a judgment in adversary proceedings. There is no like provision in the act of 1889. Nor does it contain any mention of supplemental rolls. They are administrative devices intended to safeguard and facilitate the distribution of the annuities. No doubt they are intended to be evidential of the right to share therein, but there is no basis for holding them conclusive or not subject to revision.

As the decision of the Secretary in 1927 was made in the exercise of lawful authority, it becomes necessary to examine the complaint that the decision on the merits is wrong. In doing so there is need for having in mind the limited scope of the remedy here invoked.

Mandamus is employed to compel the performance, when refused, of a ministerial duty, this being its chief use. It also is employed to compel action, when refused, in matters involving judgment and discretion, but not to direct the exercise of judgment or discretion in a particular way nor to direct the retraction or reversal of action already taken in the exercise of either.[7]

The duties of executive officers, such as the Secretary of the Interior, usually are connected with the administration of statutes which must be read and in a sense construed to ascertain what is required. But it does not follow that these administrative duties all involve judgment or discretion of the character intended by the rule just stated. Where the duty in a particular situation is so plainly prescribed as to be free from doubt and equivalent to a positive command it is regarded as being so

[7] *Commissioner of Patents* v. *Whiteley*, 4 Wall. 522, 534; *United States ex rel.* v. *Black*, 128 U. S. 40, 48; *Riverside Oil Co.* v. *Hitchcock*, 190 U. S. 316, 324-325; *Louisiana* v. *McAdoo*, 234 U. S. 627, 633; *Interstate Commerce Commission* v. *Waste Merchants Ass'n*, 260 U. S. 32, 34.

far ministerial that its performance may be compelled by mandamus, unless there be provision or implication to the contrary.[8] But where the duty is not thus plainly prescribed but depends upon a statute or statutes the construction or application of which is not free from doubt, it is regarded as involving the character of judgment or discretion which cannot be controlled by mandamus.[9]

A reference to three of the cases just cited will serve to illustrate the application of this doctrine in instances where mandamus is sought for the purpose of controlling a Secretary in the discharge of duties of the latter class. In *Riverside Oil Co.* v. *Hitchcock* mandamus was sought as a means of compelling the Secretary of the Interior to retract a decision theretofore given and to make another along different lines. This Court, after pointing out that the Secretary's duty in the matter was not formal or ministerial, said: "The court has no general supervisory power over the officers of the Land Department, by which to control their decisions upon questions within their jurisdiction. If this writ were granted we would require the Secretary of the Interior to repudiate and disaffirm a decision which he regarded it his duty to make in the exercise of that judgment which is reposed in him by law, and we should require him to come to a determination upon the issues involved directly opposite to that which he had reached, and which the law conferred

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[8] *Roberts* v. *United States,* 176 U. S. 221, 231; *Lane* v. *Hoglund,* 244 U. S. 174, 181; *Work* v. *McAlester-Edwards Co.,* 262 U. S. 200, 208; *Work* v. *Lynn,* 266 U. S. 161, 168, *et seq.; Wilbur* v. *Krushnic,* 280 U. S. 306.

[9] *Riverside Oil Co.* v. *Hitchcock,* 190 U. S. 316, 324–325; *Ness* v. *Fisher,* 223 U. S. 683, 691; *Knight* v. *Lane,* 228 U. S. 6, 13; *Lane* v. *Mickadiet,* 241 U. S. 201, 208, 209; *Alaska Smokeless Coal Co.* v. *Lane,* 250 U. S. 549, 555; *Hull* v. *Payne,* 254 U. S. 343, 347; *Work* v. *Rives,* 267 U. S. 175, 183–184. And see *United States ex rel.* v. *Hitchcock,* 205 U. S. 80, 86.

upon him the jurisdiction to make. Mandamus has never been regarded as the proper writ to control the judgment and discretion of an officer as to the decision of a matter which the law gave him the power and imposed upon him the duty to decide for himself. The writ never can be used as a substitute for a writ of error. Nor does the fact that no writ of error will lie in such a case as this, by which to review the judgment of the Secretary, furnish any foundation for the claim that mandamus may therefore be awarded." In *Knight* v. *Lane,* where a proposed adjustment of a controversy between Indians over an allotment had been approved by the Secretary in one decision and afterwards disapproved in another, it was said: "Inasmuch as the decision of the Secretary revoking his prior approval of the proposed adjustment was not arbitrary or capricious, but was given after a hearing and in the exercise of a judgment and discretion confided to him by law, it cannot be reviewed, or he be compelled to retract it, by mandamus." And in *Lane* v. *Mickadiet* mandamus was sought as a means of preventing the Secretary from reconsidering, after notice and hearing, a prior decision determining who were the heirs of a deceased Indian and sustaining the Indian's adoption of a child not related to him. The mandamus was refused on the ground that the Secretary's judgment and discretion in determining such heirships could not be thus controlled; and in disposing of an argument similar to one which is advanced here the court said: "But it is said that the purpose of the statute was to give the recognized heir a status which would entitle him to enjoy the allotted land and not to leave all his rights of enjoyment open to changing decisions which might be made during the long period of the trust term and thus virtually destroy the right of property in favor of the heir which it was the obvious purpose of the statute to protect. But

in last analysis this is a mere argument seeking to destroy a lawful power by the suggestion of a possible abuse."

It is apparent that, with the question of the Secretary's authority resolved against the relators, the only question open in this proceeding is whether the decision of 1927 was given in the discharge of a ministerial duty controllable by mandamus or of a duty requiring the exercise of judgment or discretion not thus controllable.

The questions mooted before the Secretary and decided by him were whether the fund is a tribal fund, whether the tribe is still existing and whether the distribution of the annuities is to be confined to members of the tribe, with exceptions not including the relators. These are all questions of law the solution of which requires a construction of the act of 1889 and other related acts. A reading of these acts shows that they fall short of plainly requiring that any of the questions be answered in the negative and that in some aspects they give color to the affirmative answers of the Secretary. That the construction of the acts insofar as they have a bearing on the first and third questions is sufficiently uncertain to involve the exercise of judgment and discretion is rather plain. The second question is more easily answered, for not only does the act of 1889 show very plainly that the purpose was to accomplish a gradual rather than an immediate transition from the tribal relation and dependent wardship to full emancipation and individual responsibility, but Congress in many later acts—some near the time of the decision in question—has recognized the continued existence of the tribe.[10] This recognition was respected by the Secretary

[10]Acts of August 1, 1914, c. 222, 38 Stat. 592; May 18, 1916, c. 125, 39 Stat. 135; March 2, 1917, c. 146, 39 Stat. 979; May 25, 1918, c. 86, 40 Stat. 572; June 30, 1919, c. 4, 41 Stat. 14; February 14, 1920, c. 75, 41 Stat. 419; November 19, 1921, c. 135, 42 Stat. 221; January 30, 1925, c. 114, 43 Stat. 798; February 19, 1926, c. 22, 44 Stat., P. 2, 7; March 4, 1929, c. 705, 45 Stat. 1584.

and is not open to question here.[11] With the tribe still existing the criticism by counsel for the relators of the Secretary's decision in other particulars loses much of its force.

The time fixed for the final distribution is as yet so remote that no one is now in a position to ask special relief or direction respecting that distribution.

From what has been said it follows that the case is not one in which mandamus will lie.

Judgment of Court of Appeals reversed.
Judgment of Supreme Court affirmed.

JOHN BAIZLEY IRON WORKS ET AL. *v.* SPAN.

APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA.

No. 62. Argued January 8, 1930.—Decided April 14, 1930.

The painting of angle irons as part of necessary repairs in the engine room of a completed vessel lying tied up to a pier in navigable waters has a direct relation to navigation or commerce, and a claim arising out of injuries suffered by a workman in the course of such employment is controlled exclusively by the maritime law. P. 230. 295 Pa. 18, reversed.

APPEAL from a judgment sustaining an award of compensation under a state workmen's compensation act.

Mr. Owen J. Roberts, with whom *Mr. Charles A. Wolfe* was on the brief, for appellants.

The principle of uniformity in admiralty and maritime matters required by the Federal Constitution, as defined in the case of *Southern Pacific Co.* v. *Jensen*, 244 U. S. 205, has been consistently adhered to by this Court.

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[11] *United States* v. *Holiday*, 3 Wall. 407, 419; *United States* v. *Rickert*, 188 U. S. 432, 445; *Tiger* v. *Western Investment Co.*, 221 U. S. 286, 315.

The doctrine cannot be destroyed by congressional legislation. *Washington* v. *Dawson & Co.*, 264 U. S. 219. It is not based upon the nature of a particular statute—whether compulsory or elective.

In *Grant Smith-Porter Co.* v. *Rohde*, 257 U. S. 469, it appeared that the Oregon Workmen's Compensation Law was of the elective type and that the remedy provided therein was made exclusive of all other claims against the employer. It was obvious, since the contract of employment was non-maritime and the activities of the claimant at the time his injuries were sustained had no direct relation to navigation and commerce, that no characteristic feature of the maritime law was affected, and that the application of the state act would not interfere with the proper harmony and uniformity of the maritime law in its international or interstate relations,—that it was a "matter of mere local concern."

Since the matter was of mere local concern, it is clear that the decision was in no sense a "trek backward" from the doctrine of the *Jensen* case, as it was hailed in some quarters. The uniformity doctrine forbids the application of such state legislation, only, as will work material prejudice to characteristic features of the general maritime law or will interfere with the proper harmony and uniformity of that law in its international and interstate relations. Under the circumstances disclosed in the *Rohde* case, the doctrine therefore was not at all involved. See also *Peters* v. *Veasey*, 251 U. S. 121.

Certainly the parties cannot by their own election, with or without state sanction, secure to state tribunals a jurisdiction which it is beyond the power of Congress to grant. This Court has itself expressly disaffirmed the existence of such a distinction between the effect of a compulsory act and an elective act. *State Industrial Board* v. *Terry & Tench Co.*, 273 U. S. 639; *Northern Coal & Dock Co.* v. *Strand*, 278 U. S. 142.

An insurance company, directly liable by statute to an injured employee, is not estopped to raise the question of the applicability of a local compensation act. *James Rolph Co.* v. *Industrial Accident Comm'n,* 192 Cal. 398.

The doctrine of uniformity is not limited to claims against the owner of the vessel. In a number of cases before this Court, a local workmen's compensation act has been held inapplicable notwithstanding the fact that the employer was not the owner of the vessel. *Messel* v. *Foundation Co.,* 274 U. S. 427; *Northern Coal & Dock Co.* v. *Strand,* 278 U. S. 142; *March* v. *Vulcan Iron Works,* 102 N. J. L. 337, cert. denied, 271 U. S. 682; *Danielsen* v. *Morse Dry Dock Co.,* 235 N. Y. 439, cert. denied, 262 U. S. 756; *International Stevedoring Co.* v. *Haverty,* 272 U. S. 50.

No case presents a "matter of mere local concern" in which concur the facts: (1) that the employee was working under a maritime contract, (2) that his activities at the time he was injured had direct relation to navigation and commerce, and (3) that he was injured while on board a vessel lying in navigable waters. *Doey* v. *Howland,* 224 N. Y. 30, cert. denied 248 U. S. 574; *Great Lakes Dredge & D. Co.* v. *Kierejewski,* 261 U. S. 479; *Gonsalves* v. *Morse Dry Dock & R. Co.,* 266 U. S. 171; *Robins Dry D. & R. Co.* v. *Dahl,* 266 U. S. 449; *Messel* v. *Foundation Co.,* 274 U. S. 427; *Northern Coal & D. Co.* v. *Strand,* 278 U. S. 142; *London Guarantee & A. Co.* v. *Industrial Accident Comm'n,* 279 U. S. 109.

Distinguishing: *State Industrial Comm'n* v. *Nordenholt,* 259 U. S. 263; *Millers' Ind. Underwriters* v. *Braud,* 270 U. S. 59; *Southern Surety Co.* v. *Crawford,* 274 S. W. 280; *Rosengrant* v. *Havard,* 273 U. S. 664; *T. Smith & Son, Inc.* v. *Taylor,* 276 U. S. 179; *Alaska Packers Ass'n* v. *Industrial Accident Comm'n,* 276 U. S. 467; *Sultan Ry. & T. Co.* v. *Dep't of Labor,* 277 U. S. 135.

The fact that the vessel was not actually *en route* from one port to another when the injuries were sustained, but

was tied up at a pier undergoing repairs, did not except her from the jurisdiction of the admiralty and maritime law. *The Robert W. Parsons,* 191 U. S. 17; *Robins Dry D. & R. Co.* v. *Dahl,* 266 U. S. 449; *New Bedford Dry D. Co.* v. *Purdy,* 258 U. S. 96.

The parties were not "clearly and consciously within the terms of the state statute," and they did not contract with reference thereto. *Union Fish Co.* v. *Erickson,* 248 U. S. 308.

The terms of the general contract of employment between the parties are unimportant. If the appellee, at the time his injuries were sustained, was employed on shipboard in work of a maritime nature, and his activities had direct relation to navigation and commerce, a state compensation act cannot be applied even though his general employment and usual activities may not have been maritime. *Northern Coal & D. Co.* v. *Strand,* 278 U. S. 142.

Span's activities at the time his injuries were sustained had direct relation to navigation and commerce. Certainly no activities of any nature can have a more direct relation to navigation and commerce than the performance of repairs to a vessel. Although the work of a carpenter, boilermaker, or blacksmith is not inherently maritime, the activities of such mechanics when engaged in making repairs to and upon a vessel certainly have no less a direct relation to navigation and commerce than the activities of a stevedore. *Great Lakes Dredge & D. Co.* v. *Kierejewski,* 261 U. S. 479; *Gonsalves* v. *Morse Dry D. Co.,* 266 U. S. 171; *Robins Dry Dock & R. Co.* v. *Dahl,* 266 U. S. 449; *Messel* v. *Foundation Co.,* 274 U. S. 427; *March* v. *Vulcan Iron Works,* 102 N. J. L. 337; *Doey* v. *Howland,* 224 N. Y. 30; *Danielsen* v. *Morse Dry Dock & R. Co.,* 235 N. Y. 439.

The fact that Span's injuries may not have been due to a tort, is no reason for permitting the application of the local act.

Mr. Wm. J. Conlen, with whom *Mr. Samuel Moyerman* was on the brief, for appellee.

The admiralty clause does not preclude state laws affecting matters of local concern, although pertaining to maritime affairs. *Cooley* v. *Board of Wardens,* 12 How. 299; *Morgans L. & T. R. & S. S. Co.* v. *Board of Health,* 118 U. S. 455; *Compagnie Français* v. *Board of Health,* 186 U. S. 380; *Steamboat Co.* v. *Chase,* 16 Wall. 522; *Sherlock* v. *Alling,* 93 U. S. 99; *Western Fuel Co.* v. *Garcia,* 257 U. S. 233; *Sand* v. *Manistee River Imp. Co.,* 123 U. S. 288; *Huse* v. *Glover,* 119 U. S. 543; *Wilmington Trans. Co.* v. *Railroad Co.,* 236 U. S. 151; *Port Richmond & B. P. Ferry Co.* v. *Board,* 234 U. S. 317; *Packet Co.* v. *Keokuk,* 95 U. S. 80; *Packet Co.* v. *Catlettsburg,* 105 U. S. 559; *Parkersburg & Ohio River Transp. Co.* v. *Parkersburg,* 107 U. S. 691.

The application of the state compensation act does not interfere with the necessary uniformity of general maritime law in interstate or foreign commerce.

The repair of an instrumentality of interstate commerce withdrawn for repairs does not constitute work done in interstate commerce, and a compensation act of a State applies to an employee engaged in such repair. *Industrial Accident Comm'n* v. *Davis,* 259 U. S. 182.

This suit is on a contract, which in no way relates to interstate or foreign commerce. It is a suit to enforce a statutory liability on an insurance policy which the state statute requires shall contain an actual covenant to pay the award. The application of the state compensation act does not prejudice the characteristic features of the maritime law.

When employment is in connection with essentially maritime industry, and both employer and employee are regularly so engaged, the maritime law may govern the situation, but no such facts here appear.

The reasoning of cases dealing with the application of workmen's compensation laws to injuries occurring on

navigable waters, indicates that this Court, in viewing the situation of the parties and the law properly applicable, has considered the presence or absence of facts disclosing whether the parties contemplated the maritime law as the basis of their rights and liabilities, or whether the business was closely connected with maritime matters, as of importance in reaching a conclusion. Citing: *Grant Smith-Porter Co.* v. *Rohde,* 257 U. S. 469; *State Industrial Comm'n* v. *Nordenholt Corp'n,* 259 U. S. 263; *Miller's Ind. Underwriters* v. *Braud,* 270 U. S. 59; *Alaska Packers Ass'n* v. *Industrial Accident Comm'n,* 276 U. S. 467; *Sultan Ry. & T. Co.* v. *Dep't of Labor,* 277 U. S. 135; *Rosengrant* v. *Havard,* 273 U. S. 664.

Distinguishing: *Southern Pacific Co.* v. *Jensen,* 244 U. S. 205; *Great Lakes Co.* v. *Kierejewski,* 261 U. S. 479; *Gonsalves* v. *Morse Dry Dock & R. Co.,* 266 U. S. 271; *Messel* v. *Foundation Co.,* 274 U. S. 427; *London Guarantee & A. Co.* v. *Industrial Comm'n,* 279 U. S. 109; *Robins Dry Dock Co.* v. *Dahl,* 266 U. S. 449; *Northern Coal & D. Co.* v. *Strand,* 278 U. S. 142; *March* v. *Vulcan Iron Works,* 102 N. J. L. 337; *Doey* v. *Howland,* 224 N. Y. 30; *Stewart* v. *Knickerbacker Ice Co.,* 253 U. S. 149; *Washington* v. *Dawson,* 264 U. S. 219.

To hold the compensation act inappiicable merely because the appellee ventured on navigable waters, cannot prejudice the characteristic features of the maritime law. Maritime law aims at a uniform treatment of, and prescribes the law applicable to, maritime workers and maritime employers. The appellee in this case is not shown to be a maritime worker, and his employer is not shown to be generally engaged in maritime pursuits. Under such circumstances, there is no policy of maritime law which has for its object the protection of employer and employee in the case at bar.

In matters of local concern, a compensation act may apply even if the employment is maritime, and the em-

ployment of appellee and his employer, if maritime, is of local concern, because the general and usual occupation of both is not shown to be in connection with matters of an admiralty or maritime nature.

To hold an insurance carrier which has agreed to render compensation under a state act liable on its covenant, cannot prejudice any of the characteristic features of the maritime law. The enforcement of such a contract does not involve any relation cognizable under maritime law, or any relation for which uniform maritime laws are desirable. Requiring payment of the compensation in accordance with the agreement does not impair or impinge upon any rule where uniformity is essential.

Mr. Justice McReynolds delivered the opinion of the Court.

By Act of June 2, 1915, P. L. 736, as amended June 26, 1919, P. L. 642, the Pennsylvania Legislature provided for payment of compensation by employers to employees accidentally injured, without regard to fault, created an administrative Board and prescribed procedure for carrying the general plan into effect. The statute declares there shall be a conclusive presumption that both employer and employee accept its provisions unless one of them makes written statement to the contrary. Every employer, liable to pay such compensation, unless exempted by the Board, is required to insure payment in the State Workmen's Insurance Fund or some authorized insurance company.

Purporting to proceed under the statute, Abraham Span—appellee here—made application to the Workmen's Compensation Board for an award against the John Baizley Iron Works on account of accidental injuries. He alleged that while employed by that concern he suffered injury; the accident happened "on ship Bald Hill on Delaware River, Phila., Pa., January 13, 1926" when

he was painting angle irons; both his eyes were affected by sparks from an acetylene torch in use by a fellow workman engaged in cutting iron; the business of the employer was "Iron Works" and his occupation "Blacksmith helper."

The matter went to a referee who took evidence, heard the parties, awarded compensation according to the statutory schedule, and directed appellant, The Ocean Accident and Guarantee Company, Ltd., insurer of the Iron Works, to pay the same. Upon successive appeals this award and judgment were approved by the Compensation Board, Court of Common Pleas, Superior Court, and the Supreme Court of Pennsylvania. For purposes of the appeal to the last, and as permitted by its rule, the parties substituted the following agreed statement of facts for all evidence produced at the hearing before the referee—

"The claimant, Abraham Span, was at the time of the injuries in question, on January 13, 1926, a resident of Philadelphia and employed at Philadelphia by the defendant, John Baizley Iron Works. The defendant was engaged in performing certain repairs to the steamship 'Bald Hill,' at Philadelphia, including inter alia, the painting of the engine room and repairs to the floor of the engine room. The said vessel had prior thereto steamed to Philadelphia for necessary repairs, and at the time of the alleged accident was tied up to Pier 98 South in the Delaware River. The claimant, in the course of his aforesaid employment by the defendant, was painting angle irons in the engine room of the vessel. Sparks from an acetylene torch being used by a fellow employe working near claimant, entered the claimant's eyes and caused the injuries resulting in the alleged disability of the claimant."

The Supreme Court declared: "In our opinion the insurance carrier can be held to only such liabilities as may be imposed on the employer." And it held that

when injured, Span "was doing work of a nature which had no direct relation to navigation or commerce."

The Bald Hill had steamed to Philadelphia for necessary repairs. She was a completed vessel, lying in navigable waters; the employer, Iron Works, was engaged in making repairs upon her—painting the engine room and repairing the floor; the claimant went aboard in the course of his employment and was there engaged about the master's business when hurt. Obviously, considering what we have often said, unless the State Workmen's Compensation Act changed or modified the rules of the general maritime law, the rights and liabilities of both the employer and the employee in respect of the latter's injuries were fixed by those rules and any cause arising out of them was within the admiralty jurisdiction.

The insistence in behalf of appellee Span is that when hurt he was doing work of a nature which had no direct relation to navigation or commerce; and to permit application of the State Workmen's Compensation Act would work no material prejudice to the essential features of the general maritime law as in *Grant Smith-Porter Co.* v. *Rohde,* 257 U. S. 469. But so to hold would conflict with principles which we have often announced. *Great Lakes Dredge & Dock Co.* v. *Kierejewski,* 261 U. S. 479, 480, 481; *Gonsalves* v. *Morse Dry Dock & Repair Co.,* 266 U. S. 171, 172; *Robins Dry Dock Co.* v. *Dahl,* 266 U. S. 449, 457; *Messel* v. *Foundation Co.,* 274 U. S. 427, 434; *Northern Coal & Dock Co.* v. *Strand,* 278 U. S. 142, 144.

What work has direct relation to navigation or commerce must, of course, be determined in view of surrounding circumstances as cases arise.

In *Grant Smith-Porter Co.* v. *Rohde, supra,* claimant when injured was working upon an incompleted vessel—

a thing not yet placed into navigation and which had not become an instrumentality of commerce. In *Millers' Indemnity Underwriters* v. *Braud,* 270 U. S. 59, the decedent met his death while cutting off piles driven into the land under navigable water. This had only remote relation to navigation or commerce. *Sultan Ry. Co.* v. *Dept. of Labor,* 277 U. S. 135, 136, 137, had relation to the nature of the occupation of men engaged in logging operations.

Kierejewski was a boiler maker employed by a Dredge Company to perform services as called upon. When hurt he was making repairs upon a scow moored in navigable waters. We held this work had direct relation to navigation and commerce. *Great Lakes Dredge & Dock Co.* v. *Kierejewski, supra.*

In *Gonsalves* v. *Morse Dry Dock & Repair Co., supra,* the injured workman was repairing the shell plates of a steamer then in a floating dock. The "accident did not occur upon land" and we held the rights of the parties must be determined under the maritime law.

Robins Dry Dock & Repair Co. v. *Dahl, supra,* held that as the employee was injured while repairing a completed vessel afloat in navigable waters the rights and liabilities of the parties depended upon the general maritime law and could not be enlarged or impaired by the state statute.

In *Messel* v. *Foundation Co., supra,* the claimant was injured while repairing a vessel afloat on the Mississippi River. We said—"The principles applicable to Messel's recovery, should he have one, must be limited to those which the admiralty law of the United States prescribes, including the applicable section of the Federal Employers Liability Act, incorporated in the maritime law by § 33, c. 250, 41 Stat. 988, 1007."

See *London Company* v. *Industrial Commission,* 279 U. S. 109.

Repairing a completed ship lying in navigable waters has direct and intimate connection with navigation and commerce as has been often pointed out by this Court.

The judgment of the court below must be reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed.

MR. JUSTICE STONE, dissenting.

I think the judgment below should be affirmed on the authority of *Rosengrant* v. *Havard,* 273 U. S. 664 (Feb. 28, 1927), which affirmed, without opinion but on the authority of *Grant Smith-Porter Ship Co.* v. *Rohde,* 257 U. S. 469 and *Millers' Indemnity Underwriters* v. *Braud,* 270 U. S. 59, a judgment of the Supreme Court of Alabama, *Ex parte Rosengrant,* 213 Ala. 202, *Ex parte Havard,* 211 Ala. 605. In that case one employed as a lumber inspector by a lumber manufacturer, under a non-maritime contract of employment, was injured in the course of his employment, while temporarily on board a schooner lying in navigable waters near his employer's mill. He was there engaged in checking a cargo of lumber then being discharged from a barge lying nearby, in navigable waters and alongside a wharf. Recovery for this injury under the local compensation law was allowed by the state court, on the ground that the contract of employment had no relation to navigation and was non-maritime. This, like the *Rosengrant* case, seems to differ from *Northern Coal & Dock Co.* v. *Strand,* 278 U. S. 142, in that the employee was not a seaman within the meaning of the Jones Act.

MR. JUSTICE HOLMES and MR. JUSTICE BRANDEIS concur.

EMPLOYERS' LIABILITY ASSURANCE CORPORATION, LIMITED, *v.* COOK ET AL.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 81. Argued January 14, 15, 1930.—Decided April 14, 1930.

1. The unloading of a ship is a matter maritime in character and not of purely local concern. P. 236.
2. A claim arising out of injuries received by a workman while in the hold of a ship assisting in unloading cargo is within the exclusive maritime jurisdiction, notwithstanding that his general employment contemplated non-maritime duties. *Id.*
3. The fact that a state workmen's compensation act is elective in form does not affect the rights and liabilities of the parties in respect of a claim that is within the exclusive maritime jurisdiction. *Id.*

31 F. (2d) 497, reversed.

CERTIORARI, 280 U. S. 538, to review a judgment of the Circuit Court of Appeals affirming a recovery in an action for personal injuries, based on a state workmen's compensation law, which was removed to the District Court from a state court.

Messrs. Wm. A. Vinson and *Clyde A. Sweeton* submitted for petitioner.

There is no distinction between the case at bar and the case of *Northern Coal Co.* v. *Strand*, 278 U. S. 142.

The argument that because the injury to the employee in the case at bar was not caused by tort, but was a pure accident and there was no relief in admiralty, the State of Texas could properly and legally legislate upon the subject, is not sound. Congress is given exclusive jurisdiction over all matters of admiralty and admiralty jurisdiction. Its failure to make provision in admiralty for accidental injuries does not leave the field of legisla-

tion in that respect open to the States. *Southern Pacific Co.* v. *Jensen,* 244 U. S. 205.

Distinguishing: *Grant Smith-Porter Co.* v. *Rohde,* 257 U. S. 469; *Millers' Ind. Underwriters* v. *Braud,* 207 U. S. 59.

Mr. Sam C. Polk, with whom *Messrs. D. A. Simmons* and *Ira J. Allen* were on the brief, for respondents.

The enforcement of the rights of the employee under the provisions of the state compensation act, which both the employee and employer have elected to accept, does not work a material prejudice to any characteristic feature of the general maritime law, and is not in conflict with the constitutional provision extending the judicial power of the United States "to all cases of admiralty and maritime jurisdiction." Citing: *Alaska Packers Ass'n* v. *Industrial Comm'n,* 276 U. S. 467; *Grant Smith-Porter Co.* v. *Rohde,* 257 U. S. 469; *Millers' Ind. Underwriters* v. *Braud,* 270 U. S. 59; *Lindberg* v. *Southern Cas. Co.,* 18 F. (2d) 453, cert. denied, 274 U. S. 759; *State Industrial Comm'n* v. *Nordenholt Corp'n,* 259 U. S. 263; *State Industrial Board* v. *T. & T. Co.,* 273 U. S. 639; *Ketchikan L. & S. Co.* v. *Bishop,* 24 F. (2d) 63; *Ex parte Havard,* 211 Ala. 605; *Ex parte Rosengrant,* 213 Ala. 202, aff'd 273 U. S. 664; *Oakland* v. *Industrial Comm'n,* 198 Cal. 273; *Atlantic Coast Shipping Co.* v. *Royster,* 148 Md. 433; *Toland's Case,* 258 Mass. 470; *Southern Surety Co.* v. *Crawford,* 274 S. W. 280, cert. denied, 270 U. S. 655; *Scott* v. *Dep't of Labor,* 130 Wash. 598; *Eclipse Mill Co.* v. *Dep't of Labor,* 141 Wash. 172.

Mr. Justice McReynolds delivered the opinion of the Court.

In January, 1927, while regularly employed by the Ford Motor Company and "open for any kind of work" Hal Cook was instructed as "a part of his contract of em-

ployment to assist in unloading cargo off" the steamship Lake Gorian, lately arrived at Houston, Texas, from the high seas and then tied up at the dock. While at work in the hold of the vessel he received serious injuries from which it is asserted he died March twenty-eighth.

The Ford Motor Company carried a policy of Workmen's Compensation Insurance with the petitioner, Employers' Liability Assurance Corporation, Ltd., of London, England, which undertook to protect the assured against loss by reason of injuries to its employees.

Purporting to proceed under the Workmen's Compensation Act of Texas respondents presented to the Industrial Accident Board a claim for compensation because of Cook's death, against both the Motor Company and the insurer. This was denied upon the ground that the death "was due to a condition in no way incident to or associated with his employment." As permitted by the statute respondents refused to abide by the action of the Board and brought suit in the state court.

They alleged—"While in the course of his employment, said Hal Cook was instructed by said Ford Motor Company to assist in unloading a ship or vessel belonging to the said Ford Motor Company then anchored at the wharves at Houston Ship Channel at Houston, Texas, and while so engaged said Hal Cook suffered severe injuries in that while he and other employees of the said Ford Motor Company were unloading from said ship the cargo thereon, consisting of axles and various other parts of automobiles, and transferring the same to the wharves where said ship was anchored, the said Hal Cook, while lifting said automobile parts, received a severe strain to the internal muscles of his back . . . ," which caused his death.

They asked for judgment setting aside the award of the Board and for compensation as provided by the statute.

The cause was removed to the United States District Court. It heard the evidence, denied a motion for an instructed verdict in favor of the petitioner, submitted the matter to a jury and upon a verdict in respondents' favor entered judgment. Appeal was taken to the Circuit Court of Appeals for the Fifth Circuit which held—"We think it fairly can be said that the matter of unloading these two ships of the Ford Motor Co. at rare intervals was 'of merely local concern, and its regulation by the state will work no material prejudice to any feature of the general maritime law.'"

The record plainly discloses that while in the course of his employment and at work in the hold assisting in unloading a vessel afloat on navigable waters Cook received injuries out of which this suit arose. There is nothing in principle to differentiate this case from *Northern Coal Company* v. *Strand*, 278 U. S. 142, and the judgment of the Circuit Court of Appeals must be reversed.

See *Nogueira* v. *New York, N. H. & H. R. R. Co.*, decided this day, *ante*, p. 128.

The proceeding to recover under the State Compensation Act necessarily admitted that the decedent was employed by the insured when injured. Any right of recovery against the insurance carrier depends upon the liability of the assured. Whether Cook's employment contemplated that he should work regularly in unloading vessels or only when specially directed so to do is not important. The unloading of a ship is not matter of purely local concern as we have often pointed out. Under the circumstances disclosed the State lacked power to prescribe the rights and liabilities of the parties growing out of the accident. The fact that the Compensation Law of the State was elective in form does not aid the respondents. The employer did not surrender rights

guaranteed to him by the Federal law merely by electing to accept one of two kinds of liability in respect of matters within the State's control, either of which she had power to impose upon him.

The judgment of the court below must be reversed. The cause will be remanded for further proceedings in conformity with this opinion.

Reversed.

Opinion of MR. JUSTICE STONE.

As the Court, in *Northern Coal & Dock Company* v. *Strand,* 278 U. S. 142, held that one engaged as a stevedore in unloading a ship lying in navigable waters is a seaman within the meaning of the Jones Act, 41 Stat. 1007, 46 U. S. C. A., § 688; *International Stevedoring Company* v. *Haverty,* 272 U. S. 50, and that by that Act Congress had occupied the field and excluded all state legislation having application within it, I am content to rest this case on that ground. See *Nogueira* v. *N. Y., N. H. & H. R. R.,* decided this day, *ante,* p. 128. But I do not agree that the present case is so exclusively controlled by the maritime law that workmen otherwise in the situation of respondent, but who are not seamen and therefore not given a remedy by the Jones Act, and who are not within the purview of the Employers' Liability Act, 35 Stat. 65 (45 U. S. C. A., § 51), are excluded from the benefits of a compensation act like that of Texas. The Court held otherwise in *Rosengrant* v. *Havard,* 273 U. S. 664, commented on in my opinion in *John Baizley Iron Works* v. *Span,* decided this day, *ante,* p. 222.

The present case arose before the effective date of the Longshoremen's and Harbor Workers' Act, 44 Stat. 424 (33 U. S. C. A., §§ 901, 950). But the remedies given by that Act are withheld where recovery may be had under local compensation acts, and not all persons engaged in

unloading a vessel are entitled to recover under it, even though without remedy under local compensation laws. See § 3 (a) [33 U. S. C. A., § 903 (a)].

MR. JUSTICE HOLMES and MR. JUSTICE BRANDEIS concur.

MAY ET AL., EXECUTORS, *v.* HEINER, COLLECTOR OF INTERNAL REVENUE.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

No. 311. Argued March 7, 1930.—Decided April 14, 1930.

1. A transfer in trust by a grantor since deceased, under which the income was payable to decedent's husband during his lifetime and after his death to the decedent during her lifetime, with remainder over to her children, *held* not made in contemplation of or intended to take effect in possession or enjoyment at or after death, within the legal significance of those words, and that, therefore, the corpus of the trust should not be included in the value of the gross estate of the decedent for purposes of estate tax under § 402 (c) of the Revenue Act of 1918. P. 243.
2. The estate tax of the Revenue Act of 1918, § 401, imposes an excise upon the transfer of an estate upon the death of the owner. P. 244.

32 F. (2d) 1017, reversed.

CERTIORARI, 280 U. S. 542, to review a judgment of the Circuit Court of Appeals which affirmed a judgment of the District Court, 25 F. (2d) 1004, sustaining a federal estate tax.

Mr. Charles H. Sachs, with whom *Mr. Louis Caplan* was on the brief, for petitioners.

The transfer in this case was effective to pass the title to the property and the economic benefits to be derived therefrom immediately when it was made, on October 1, 1917.

The only interest which decedent had in the property at the time of her death was her contingent life estate.

If neither the value of the life estates, nor that of the remainders, was required to be included in the gross estate in the *Reinecke* case, 278 U. S. 339, notwithstanding the fact that the remainders were intended to take effect in possession or enjoyment at or after settlor's death, the value of the life estate given here to the settlor's husband, and the value of the remainder given to her children, should not be included in the gross estate. The circumstance that in this case there was the possibility of a life estate in favor of settlor intervening does not detract from the finality and irrevocability of the estates given to others. In principle, there is no difference between the gift of a life estate to A, with remainder to B, and a gift of a life estate to A, a life estate to Z, if the latter survives A, and the remainder to B.

A tax attaches only in those cases where there is a shifting of the economic use and benefit of property upon the death of the settlor, and the tax is measured by the value of the economic benefits which pass from the settlor to his successor by the settlor's death. *Chase Nat'l Bank* v. *United States,* 278 U. S. 327; *Carnill* v. *McCaughn,* 30 F. (2d) 696; *Nichols* v. *Bradley,* 27 F. (2d) 47.

If the Revenue Act of 1918, according to a correct construction, purports to authorize the tax here imposed, it is unconstitutional. *Nichols* v. *Coolidge,* 274 U. S. 531.

Assistant Attorney General Youngquist, with whom *Attorney General Mitchell* and *Messrs. Sewall Key* and *J. Louis Monarch,* Special Assistants to the Attorney General, were on the brief, for respondent.

Congress has power, under the Constitution, to impose, and by the Act of 1918 has imposed, an estate tax measured by the value of property irrevocably transferred by a decedent in his lifetime, but subject to a reservation to the decedent of a life estate therein. *Y. M. C. A.* v.

Davis, 264 U. S. 47; *Chase Nat'l Bank* v. *United States,* 278 U. S. 327.

The general characteristics of a testamentary disposition, putting aside matters of form, are that the property go over at the death of the testator, and that during his lifetime he have the possession, enjoyment, or control. It has been frequently held that a trust under which the settlor receives the income of property during life, and upon his death the corpus is distributed to designated beneficiaries, involves a transfer to such beneficiaries intended to take effect in possession or enjoyment at or after the settlor's death, and is subject to an inheritance tax. The fact that the corpus of the trust estate is irrevocably vested at the time the trust is created is held to be immaterial, as neither possession nor enjoyment within the meaning of the law takes effect until the death of the settlor. *McCaughn* v. *Girard Trust Co.,* 11 F. (2d) 520; *Reed* v. *Howbert,* 8 F. (2d) 641; *Una Libby Kaufman,* 5 B. T. A. 31; *Matter of Green,* 153 N. Y. 223; *Crocker* v. *Shaw,* 174 Mass. 266; *Carter* v. *Bugbee,* 91 N. J. L. 438; *Todd's Estate, (No. 2),* 237 Pa. 466. See also *Tips* v. *Bass,* 21 F. (2d) 460. This principle is recognized generally. See Gleason & Otis, Inheritance Taxation, 2d ed., p. 125 *et seq.*

Carnill v. *McCaughn,* 30 F. (2d) 696, is to the contrary. *Cf.* also *Frew* v. *Bowers,* 12 F. (2d) 625; *Boyd* v. *United States,* 34 F. (2d) 488. *Carnill* v. *McCaughn* is now pending in the Circuit Court of Appeals for the Third Circuit. In deciding it the District Court held that the decisions of this Court in *Nichols* v. *Coolidge,* 274 U. S. 531; *Reinecke* v. *Northern Trust Co.,* 278 U. S. 339; and *Chase Nat'l Bank* v. *United States,* 278 U. S. 327, have modified the doctrine relied upon by the Circuit Court of Appeals for the Third Circuit in the present case and in *McCaughn* v. *Girard Trust Co., supra.*

The right to enjoy the income is what gives property value, and the reservation of that right is equivalent to the continued ownership of the property. The cessation by death of such a present right to receive income constitutes a taxable transfer.

The imposition of the tax is not affected by the fact that the property transferred was subjected by the transferor to a further reservation of a life estate therein in favor of her husband. If the husband's life interest continued beyond her death, the reservation would continue during his lifetime. But in either case her death would relieve the trust from the burden of her reserved life interest; and in either case the trust was intended to and did as to the children "take effect in possession or enjoyment at or after" her death.

In any event, we contend that the termination by death of a contingent life estate will support the tax, which is one imposed upon "an interest which closed by reason of death." *Y. M. C. A.* v. *Davis,* 264 U. S. 47; *Edwards* v. *Slocum,* 264 U. S. 1. The right of the decedent to receive the income of this trust for life in the event she survives her husband is a right which may postpone the enjoyment by the remaindermen of the economic benefits of the property transferred. The termination of this right by the death of the decedent, freeing the remainder of the possibility of its exercise, is a transfer within the meaning of the statute, properly measured by the value of the property thus relieved of the burden.

This transfer comprised the right to receive the income which is "that which gives value to property." *Pollock* v. *Farmers' Loan & T. Co.,* 158 U. S. 601. Accordingly, the tax was properly reckoned upon the value of the corpus of the trust relieved of the burden of the settlor's life estate, just as the tax in *Reinecke* v. *Northern Trust*

Co., supra, was held to be rightly imposed on the transfers of the corpus of the two trusts.

The taxable transfer was completed upon the settlor's death in 1920, and the imposition of the tax by the Revenue Act of 1918 involves no question of retroactivity.

Mr. Arthur W. Machen, Jr., filed a brief on behalf of Safe Deposit & Trust Company of Baltimore, as *amicus curiæ,* by special leave of Court.

Mr. Ward Loveless filed a brief as *amicus curiæ,* by special leave of Court.

Mr. Justice McReynolds delivered the opinion of the Court.

By a written instrument dated October 1st, 1917, Pauline May, wife of Barney May, " transferred, set over and assigned " to him and others, as trustees, (with power to change the investments) certain described securities—bonds, notes, corporate stocks, and money—in trust, to collect the income therefrom and after discharging taxes, expenses, etc., to pay the balance " to Barney May during his lifetime, and after his decease, to Pauline May during her lifetime, and after her decease, all the property in said Trust, in whatever form or shape it may be, shall, after the expenses of the Trust have been deducted or paid, be distributed equally among " her four children, their distributees, or appointees.

Mrs. May died March 25, 1920. Thereafter the Commissioner of Internal Revenue, purporting to proceed under authority of the Revenue Act of 1918, Title IV, 40 Stat. 1057, 1096, 1097, demanded that her executors pay additional taxes reckoned upon the value of the property held under the above-described trust instrument. Having paid the required sum, the executors—petitioners here—asked that it be refunded. By order of February

20, 1924, the Commissioner denied their request. In support of this action he said—

"This trust was included in decedent's gross estate on final audit and review on the ground that it was intended to take effect in possession or enjoyment at or after death. In this case the principal of the trust fund could not take effect in possession until the death of the decedent. According to the provisions of the trust agreement, if the decedent's husband died before her, the income was to be paid to her until her death. The gift of the principal, therefore, could not take effect during the decedent's lifetime. This case comes literally within the terms of the statute, and it has been held by a number of courts in different States that such a transfer as this is taxable, these cases being decided under statutes using the same language as is contained in the Federal Estate Tax Law."

Seeking to enforce their claim the executors sued the Collector in the District Court, Western District of Pennsylvania; judgment in his favor was affirmed by the Circuit Court of Appeals. The matter is here upon certiorari.

The record fails clearly to disclose whether or no Mrs. May survived her husband. Apparently she did not. But this is not of special importance since the refund should have been allowed in either event.

The transfer of October 1st, 1917, was not made in contemplation of death within the legal significance of those words. It was not testamentary in character and was beyond recall by the decedent. At the death of Mrs. May no interest in the property held under the trust deed passed from her to the living; title thereto had been definitely fixed by the trust deed. The interest therein which she possessed immediately prior to her death was obliterated by that event.

Section 401, Revenue Act of 1918, lays a charge "upon the transfer of the net estate of every decedent dying after the passage of this Act," and Section 402 directs that "the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated . . . (c) to the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has at any time created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death . . ."

The statute imposes "an excise upon the transfer of an estate upon death of the owner." *Y. M. C. A.* v. *Davis,* 264 U. S. 47, 50; *Nichols* v. *Coolidge,* 274 U. S. 531, 537.

In *Reinecke* v. *Northern Trust Co.,* 278 U. S. 339, 347, 348, the estate tax prescribed by the Revenue Act of 1918, Sec. 402 (c), and carried into the Act of 1921, 42 Stat. 278, as Sec. 402 (c) thereof, was under consideration. This Court said—

"In its plan and scope the tax is one imposed on transfers at death or made in contemplation of death and is measured by the value at death of the interest which is transferred. . . . One may freely give his property to another by absolute gift without subjecting himself or his estate to a tax, but we are asked to say that this statute means that he may not make a gift *inter vivos,* equally absolute and complete, without subjecting it to a tax if the gift takes the form of a life estate in one with remainder over to another at or after the donor's death. It would require plain and compelling language to justify so incongruous a result and we think it is wanting in the present statute. . . .

"In the light of the general purpose of the statute and the language of § 401 explicitly imposing the tax on net

estates of decedents, we think it at least doubtful whether the trusts or interests in a trust intended to be reached by the phrase in § 402 (c) 'to take effect in possession or enjoyment at or after his death,' include any others than those passing from the possession, enjoyment or control of the donor at his death and so taxable as transfers at death under § 401. That doubt must be resolved in favor of the taxpayer. . . ."

The judgment of the Circuit Court of Appeals is erroneous and must be reversed. The cause will be remanded to the District Court for further proceedings in conformity with this opinion.

Reversed.

LUCAS, COMMISSIONER OF INTERNAL REVENUE, *v.* THE PILLIOD LUMBER COMPANY.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

No. 356. Argued January 14, 1930.—Decided April 14, 1930.

1. The five-year period of limitations prescribed by the Revenue Act of 1924, § 277 (a) (2), limiting the time within which after the filing of a return taxes under the Revenue Act of 1918 might be determined and assessed, does not begin to run from the time of the filing of a "tentative return," nor from the time of the filing of a return not verified by the proper corporate officers as required by § 239 of the Act of 1918. P. 247.
2. A statute of limitations runs against the Government only when it assents and upon the conditions prescribed. P. 249.
3. The requirement of § 239 of the Revenue Act of 1918 that returns of corporations shall be sworn to as specified, is not subject to waiver. *Id.*

33 F. (2d) 245, reversed.

CERTIORARI, 280 U. S. 544, to review a decree of the Circuit Court of Appeals which reversed a decision of the Board of Tax Appeals, 7 B. T. A. 591, sustaining an as-

sessment of deficiency in income and profits taxes of respondent.

Assistant Attorney General Youngquist, with whom *Messrs. Claude R. Branch, Sewall Key,* and *Barham R. Gary,* Special Assistants to the Attorney General, were on the brief, for petitioner.

Mr. Henry M. Ward, with whom *Mr. Herbert W. Nauts* was on the brief, for respondent.

Mr. Justice McReynolds delivered the opinion of the Court.

Using therefor what is known as "Form 1031T," on March 14, 1919, respondent, Pilliod Lumber Company, executed and filed with the Collector of Internal Revenue a tentative return and estimate of corporate income and profits taxes for 1918, signed and sworn to by its president and treasurer. At the same time it remitted $1,000, one-fourth of the estimated taxes, and requested an extension of forty-five days within which to present a final report as required by law.

May 31, 1919, it lodged with the Collector another return for 1918, made out upon Form 1120, which contained various statements in respect of gross income, deductions, credits, etc., but was not signed or sworn to by anyone.

In answer to a request from the Commissioner of Internal Revenue, respondent's president and treasurer swore to and filed with him, September 17, 1923, the following affidavit concerning the return of May 31—

"We, the undersigned, hereby affirm that our names should have appeared on our income tax return for 1918, and which to the best of our knowledge and belief is correct. We are unable to furnish duplicate signed report, being unable to locate copy, believing same to have been destroyed with other records."

Two years later—October 23, 1925,—the Commissioner notified the Company of a deficiency assessment amounting to $963.34. Affirming that any claim for such tax had been extinguished by the five-year statute of limitations it appealed to the Board of Tax Appeals. They held that neither the tentative return of March, 1919, nor the later unsworn one, was adequate to set the statute of limitations in motion and affirmed the Commissioner's ruling. The Circuit Court of Appeals concluded that the unsworn return was adequate and upon that ground reversed the action of the Board without expressing any opinion concerning the effect of the tentative return.

The Revenue Act of 1918, c. 18, 40 Stat. 1057, 1081, 1083, provides—

"Sec. 239. That every corporation subject to taxation under this title and every personal service corporation shall make a return, stating specifically the items of its gross income and the deductions and credits allowed by this title. The return shall be sworn to by the president, vice president, or other principal officer and by the treasurer or assistant treasurer. . . .

"Sec. 250. (d) Except in the case of false or fraudulent returns with intent to evade the tax, the amount of tax due under any return shall be determined and assessed by the Commissioner within five years after the return was due or was made, and no suit or proceeding for the collection of any tax shall be begun after the expiration of five years after the date when the return was due or was made. In the case of such false or fraudulent returns, the amount of tax due may be determined at any time after the return is filed, and the tax may be collected at any time after it becomes due."

The Revenue Act of 1924, c. 234, 43 Stat. 253, 287, 299, 301, by Sec. 239 (a), requires corporations to make returns like those prescribed by the Act of 1918. Sec-

tion 277 (a) directs that except as provided in section 278, which relates to false or fraudulent returns, and certain subdivisions of sections 274 and 279, not presently important, taxes for 1921, and afterwards, shall be assessed within four years after return filed; also that taxes for 1918, etc., shall be assessed within five years after return filed. Section 280 declares—If hereafter the Commissioner determines that any assessment should be made in respect of any income, war-profits, or excess-profits tax imposed by the Revenue Acts of 1916, 1917, 1918, or 1921, the amount which should be assessed (whether as deficiency or as interest, penalty, or other addition to the tax) shall be computed as if this Act had not been enacted, but the amount so computed shall be assessed, collected, and paid in the same manner and subject to the same provisions and limitations (including the provisions in case of delinquency in payment after notice and demand), as in the case of the taxes imposed by this title, except as otherwise provided in section 277.

Respondent maintains that the five-year statute of limitations began to run against the claim for 1918 taxes when the tentative return of March 14, 1919, was filed with the Collector, or when he received the unverified return, May 31, 1919, and therefore the deficiency assessment of October 23, 1925, was out of time.

The argument based upon the supposed effect of the first or tentative return is the same as that considered and rejected in *Florsheim Bros., etc.* v. *United States,* and *White, Collector,* v. *Hood Rubber Co.,* 280 U. S. 453.

That the so-called return of May 31, 1919, unsupported by oath, did not then meet the definite requirements of Section 239 is manifest. But respondent says the defect was cured or became immaterial since the tax officers accepted and held the return for several years, and in 1923 requested and obtained an adequate verification by the proper corporate officers.

Under the established general rule a statute of limitation runs against the United States only when they assent and upon the conditions prescribed. Here assent that the statute might begin to run was conditioned upon the presentation of a return duly sworn to. No officer had power to substitute something else for the thing specified. The return so long as it remained unverified by oath of proper corporate officers did not meet the plain requirements. The necessity for meticulous compliance by the taxpayer with all named conditions in order to secure the benefit of the limitation was distinctly pointed out in *Florsheim Bros., etc.* v. *United States, supra.*

The Board of Tax Appeals reached the proper result. The judgment of the court below must be reversed.

Reversed.

ALEXANDER SPRUNT & SON, INC., ET AL. *v.* UNITED STATES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF TEXAS.

No. 19. Argued October 31, November 1, 1929.—Decided April 14, 1930.

1. Where an order of the Interstate Commerce Commission finding a rate differential unduly prejudicial and preferential as to certain shippers and prescribing a readjustment, has been acquiesced in by the carriers affected, a shipper who is thereby deprived of an economic advantage over competitors incident to the exercise of the supposed right of the carriers to maintain the old differential but none of whose own rights is violated by its elimination, has no standing to maintain an independent suit to set the order aside upon the ground that there was no basis for the finding. P. 254.
2. An order of that character was attacked under the Act of June 18, 1910, as amended by the Urgent Deficiencies Act of October 22, 1913, in a suit brought by some of the carriers, and in another brought by shippers who enjoyed the alleged preference, the suits being consolidated and heard as one case. Upon dismissal of the bills, the plaintiff carriers took no appeal and joined the other

carriers in complying with the order by filing the new rates prescribed. *Held:*

(1) That the shippers could not maintain an appeal to this Court upon the issue of undue preference, first, because they lacked an independent standing and, second, because, through the carriers' acquiescence, that issue had become moot. Pp. 254, 257.

(2) That the suit could not be maintained upon the ground that the order, in alleged excess of the authority conferred by § 15 of the Interstate Commerce Act, had increased certain rates without a prior finding and hearing as to the reasonableness of the rate levels, since the order left open any question of reasonableness and shippers aggrieved in that regard had their remedy before the Commission under §§ 13 and 15. P. 258.

3. The Commission's order in this case leaves the appellant shippers free to demand allowances for transportation service performed by them under contract with the carriers and which properly should be performed by the carriers. P. 259.

4. A decree dismissing on the merits a consolidated suit which became moot after the decree was entered should, as far as concerns the plaintiffs in one bill, who appealed, be reversed with directions to dismiss their bill without costs, but should stand as to the plaintiffs in the other bill, who took no appeal. P. 260.

23 F. (2d) 874, reversed.

APPEAL from a decree of the District Court, of three judges, dismissing the bills in two consolidated suits to set aside an order of the Interstate Commerce Commission. The appellant shippers were the plaintiffs in one of the suits. Plaintiffs in the other, who were carriers, took no appeal.

Messrs. John W. Davis and *R. C. Fulbright* for appellants.

Mr. J. Stanley Payne, with whom *Solicitor General Hughes* and *Messrs. George C. Butte* and *Daniel W. Knowlton* were on the brief, for the United States and Interstate Commerce Commission.

Mr. Albert L. Reed, with whom *Messrs. Mart H. Royston* and *C. B. Cochran* were on the brief, for Arkansas Cotton Trade Association et al., interveners.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

The Interstate Commerce Commission entered, on April 4, 1927, an order directed to the railroads operating in Oklahoma, Arkansas, Texas and Louisiana, which required them to remove, in a manner prescribed, undue prejudice and preference caused by their rates on cotton shipped from interior points to Houston and other ports on the Gulf of Mexico. *Application of Rates on Cotton to Gulf Ports,* 100 I. C. C. 159; 123 I. C. C. 685. Two suits, under the Act of June 18, 1910, c. 309, 36 Stat. 539, as amended by Urgent Deficiencies Act of October 22, 1913, c. 32, 38 Stat. 208, 220, were promptly brought in the federal court for southern Texas, to enjoin the enforcement of the order and to set it aside. The first suit was brought by Alexander Sprunt & Son, Inc., and others interested in cotton compresses and warehouses located at wharves on the waterfront. The second, by the Texas & New Orleans Railroad Company and other rail carriers. The two cases were, with the consent of the parties, ordered consolidated as a single cause with a single record. The consolidated case was heard by three judges. An interlocutory injunction issued. Upon final hearing, the District Court sustained the validity of the order; dissolved the injunction; and entered a decree dismissing the bills. 23 F. (2d) 874.

None of the carriers appealed from the decree. Acquiescing in the decision of the District Court, and in the order of the Commission, the railroads promptly established the prescribed rate adjustment; and it is now in force. This appeal was taken by Alexander Sprunt & Son, Inc., and those shippers and associations of shippers which had joined below as co-plaintiffs in the bill filed by it. No stay of the decree pending the appeal was granted or sought. And no railroad was made a party to the proceedings on the appeal. At the argument, this

Court raised the preliminary question whether there is any substantive ground for appeal by the shippers alone. In order to answer that question, a fuller statement is necessary of the matter in controversy before the Commission and of the terms of the order entered by it.

From interior points in Texas, Louisiana, Oklahoma and Arkansas to the several ports on the Gulf of Mexico there were on all the railroads two schedules of rates on cotton—the domestic or city-delivery rates and the export or ship-side rates. The latter were, prior to the entry of the order complained of, 3 or 3.5 cents per 100 pounds higher than the former. All rates permit concentration and compression in transit and include free switching, to and from the warehouses and compresses.[1] Complaint was made that in applying these rates the railroads unjustly discriminated against other shippers and in favor of Alexander Sprunt & Son, Inc., and other owners of warehouses and compresses at the wharves, by applying the domestic rates on shipments to their plants of cotton intended for export or for transshipment by vessel coastwise. It was sought to justify this practice on the ground

[1] Cotton is usually ginned at country points and put in bales weighing 525 pounds with a density of 11 or 12 pounds per cubic foot. Before these bales can be dealt in on the cotton exchanges they must commonly go through two further processes. Concentration—for purposes of merchandising; that is, grading and assorting into lots of quality and quantity demanded by the ultimate purchasers. Compression—for purposes of transportation; that is, reducing the size of the bale by increasing its density, which, in order to secure favorable rail rates, must commonly be 22.5 pounds per cubic foot, and, in order to secure favorable vessel rates, must commonly be 32 pounds per cubic foot. The former is called standard density; the latter, high density. Some concentration and high density compression plants, are located at interior points. Many are located in the ports, at places remote from the water-front, or the wharves. These are called up-town plants. Since 1921, several plants have been located at the water-front, in close proximity to the vessels by which the cotton is shipped abroad or coastwise.

that the conditions which had led to charging the higher rate for export cotton were absent in the case of these water-front plants.

The difference of about 3.5 cents per 100 pounds between the domestic and the export rates is approximately equal to the cost of transporting the cotton, by dray or by switching, from up-town concentrating and high density compressing plants in the ports to ship-side. This difference served to equalize rates as between the up-town plants and the interior plants. *Louisiana Cotton,* 46 I. C. C. 451; *Galveston Commercial Asso.* v. *Alabama & Vicksburg Ry. Co.,* 77 I. C. C. 388. In 1921, and later, warehouses and high density compressing plants were located at the water-front, almost within reach of the ship's tackle. From these plants, there was no need of local transportation by dray or switching, to ship-side. The lower domestic rates were accordingly applied on cotton shipped to them, even though intended for export.

This practice gave to the water-front plants an obvious advantage over those located up-town in the ports and over those located in the interior. Widespread complaint of undue prejudice and preference led the Commission to institute upon its own motion, a general investigation concerning the lawfulness of the practices of the carriers in connection with the application of the city-delivery and ship-side rates, with a view to determining, among other things, "whether any change should be made in existing tariff regulations or rates in order to avoid or remove such undue preference, if any, that results or may result in favor of said water-front shippers or localities."[2] Practically all the railroads operating in the four southwestern states were made respondents to that proceeding.

[2] With this general investigation, there was consolidated a formal complaint, Weatherford, Crump & Co. *v.* Abilene & Southern Ry. Co. et al., which had been filed earlier. 100 I. C. C. 159, note 1.

After extended hearings, the Commission found that the existing adjustment of rates to ports was unduly prejudicial to the warehouses and compresses up-town and in the interior; that it was unduly preferential of those at the water-front; and that the rates should be readjusted so that one rate would apply for all deliveries within the usual switching limits of the respective ports, except that the export rates should be made higher than the domestic rates by an amount equal to the wharfage. The Commission did not, at first, specify the particular rate adjustment to be established to accomplish the result directed. Without inquiring into the reasonableness of the rates, it stated that the equality of treatment might be effected by any readjustment which would preserve, but not increase, the carriers' revenues. 100 I. C. C. 159, 167. But upon reopening the proceeding, pursuant to petitions therefor, the Commission prescribed specifically what the rate adjustment should be. It found that " for the purposes of this case, a fair and reasonable basis for equalizing the city-delivery and ship-side rates will be to increase the city-delivery rates 1 cent per 100 pounds and reduce the ship-side rates, exclusive of wharf or pier terminal charges equivalent to 2 cents per 100 pounds, to the basis of the increased city-delivery rates." 123 I. C. C. 685, 695.

First. The appellants contend that there is no basis for the Commission's finding of undue prejudice and preference. We are of opinion that appellants have no standing, in their own right, to make this attack. In so far as the order directs elimination of the rate differential previously existing, it worsened the economic position of the appellants. It deprived them of an advantage over other competitors of almost 3.5 cents per hundred pounds. The enjoyment of this advantage gave them a distinct interest in the proceeding before the Commission under § 3 of the Interstate Commerce Act. For, their competitive advan-

tage was threatened. Having this interest, they were entitled to intervene in that administrative proceeding. And if they did so, they became entitled under § 212 of the Judicial Code to intervene, as of right, in any suit "wherein is involved the validity" of the order entered by the Commission.[3] But that interest alone did not give them the right to maintain an independent suit, to vacate and set aside the order. Such a suit can be brought by a shipper only where a right of his own is alleged to have been violated by the order. And his independent right to relief is no greater where by intervention or otherwise he has become a party to the proceeding before the Commission or to a suit brought by a carrier. In the case at bar, the appellants have no independent right which is violated by the order to cease and desist. They are entitled as shippers only to reasonable service at reasonable rates and without unjust discrimination. If such service and rates are accorded them, they cannot complain of the rate or practice enjoyed by their competitors or of the retraction of a competitive advantage to which they are not otherwise entitled. The advantage which the appellants enjoyed under the former tariff was merely an incident of, and hence was dependent upon, the right, if any, of the carriers to maintain that tariff in force and their continuing desire to do so.

Why the carriers filed the new rate structure now in force is no concern of the appellants. If the carriers had done so wholly of their own motion, obviously these shippers would have had no ground of complaint, before any tribunal, unless the new rates were unreasonable or unjust. If they were believed by the appellants to be so, a complaint before the Commission would be the appropriate remedy. *Texas and Pacific Ry. Co.* v. *Abilene*

[3] Originally the Commerce Court Act, June 18, 1910, c. 309, 36 Stat. 542; U. S. C., Tit. 28, § 45a.

Cotton Oil Co., 204 U. S. 426; *United States* v. *Merchants & Manufacturers Traffic Association*, 242 U. S. 178, 188; *Great Northern Ry. Co.* v. *Merchants Elevator Co.*, 259 U. S. 285, 295. The appellants' position is legally no different from what it would have been if the carriers had filed the rates freely, pursuant to an informal suggestion of the Commission or one of its members; or if the filing had been made by carriers voluntarily after complaint filed before the Commission, which had never reached a hearing, because the rate structure complained of was thus superseded.[4] The carriers who were respondents before the Commission filed the new rates presumably because they now desire them. Nothing to the contrary is shown. So far as the carriers are concerned, it is as if the new rates had been filed wholly of their own accord and as if there had never been a controversy before the Commission. Since the appellants' economic advantage as shippers was an incident of the supposed right exercised by the carriers, the appellants cannot complain after the carriers are satisfied or prefer not to press their right, if any.

Appellants' present position resembles in all essentials one which was put forward in *Edward Hines Trustees* v. *United States*, 263 U. S. 143, 147, 148 and *United States* v. *Merchants & Manufacturers Traffic Association*, 242 U. S. 178, 188. There, as here, the plaintiffs were deprived by the order of the Commission of a competitive advantage. But the plaintiffs there, as here, were not

[4] Compare Rules of Practice (Revised to December 2, 1919) IV(i); Manufacturers' & Jobbers' Union of Mankato *v.* Minneapolis & St. Louis Ry. Co., 1 I. C. C. 227; Lincoln Board of Trade *v.* Union Pacific Ry. Co., 2 I. C. C. 229; The Pennsylvania Co. *v.* Louisville, New Albany & Chicago Ry., 3 I. C. C. 223; American Wire Nail Co. *v.* Queen & Crescent Fast Freight Line, 3 I. C. C. 224; Alan Wood Iron & Steel Co. *v.* Pa. R. R. Co., 24 I. C. C. 27, 33.

subjected to or threatened with any legal wrong. And, since the carriers acquiesced in the order of the Commission, the plaintiffs could not maintain an independent action to annul the order. Appellants' present position is unlike that of the plantiffs in the cases relied upon. *United States* v. *Village of Hubbard,* 266 U. S. 474; *The Chicago Junction Case,* 264 U. S. 258; *Skinner & Eddy Corporation* v. *United States,* 249 U. S. 557; *Interstate Commerce Commission* v. *Diffenbaugh,* 222 U. S. 42. In each of those cases, an independent legal right of the plaintiff was affected by the order which it was sought to set aside.[5]

Moreover, by the action of the carriers, the issue of undue prejudice and unjust preference, which had been passed upon by the Commission, has become moot. Compare *United States* v. *Anchor Coal Co.,* 279 U. S. 812. Most of the carriers never sought to annul the order. Those that joined in the suit to set it aside have since voluntarily severed themselves from the shippers who object

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[5] Two suits were involved in the *Diffenbaugh* case. One was against a carrier to recover allowances for substituted transportation facilities alleged to be due under § 15 of the Act. The Interstate Commerce Commission was joined and its order prohibiting the allowances sought to be enjoined because the order would otherwise have constituted a defense to the suit. In the other action, interested carriers intervened as parties plaintiff and persisted in their effort to set aside the order. In *Skinner & Eddy Corporation* v. *United States,* the right under the last paragraph of § 4 of the Act, not to pay increased rates except when due to reasons other than the elimination of water competition, was clearly the right of the shipper. In the *Chicago Junction Case,* the order violated the plaintiff's right under paragraph 2 of § 5 to equal treatment; and the plaintiff, with those similarly situated, was the only person in interest against the order. In the *Hubbard* case, the challenged order increasing rates was alleged to violate a contract between the plaintiff and the carrier, who, it was alleged, was not subject to the jurisdiction of the Commission.

to it. The fact that some carriers at one time protested is of no significance, among other reasons, because their protest may have been directed, not against that part of the order which commanded an equalization of rates, but against the particular figure at which equalization was ordered.[6] There is nothing to show that any carrier is now in sympathy with the appellants' attack on the order. A judgment in appellants' favor would be futile. It would not restore the appellants to the advantage previously enjoyed. If the Commission's order is set aside, the carriers would still be free to continue to equalize the rates; and for aught that appears would continue to do so.

Second. Appellants complain of the order also on the ground that it authorized an increase in the local or domestic delivery rates without a hearing and findings as to the reasonableness of the level of either the old or the new rates. It is urged that § 15 of the Act does not authorize the Commission to fix the rates necessary to remove undue prejudice without such hearing and findings. But plainly appellants cannot, in their own right, be heard to complain in this suit of this part of the order. The Commission's first order left the carriers free to choose the method for the removal of the preference. Compare *American Express Co.* v. *Caldwell,* 244 U. S. 617, 625; *United States* v. *Illinois Cent. R. R. Co.,* 263 U. S. 515, 521. If the carriers had, of their own accord, adopted the plan later prescribed by the Commission, appellants could, obviously, not be heard to complain of the reasonableness of the rate adopted, except in a proceeding before the Commission instituted under §§ 13 and 15 of the Act. For reasons which it is unnecessary to detail, the carriers were unable to agree upon a plan. They petitioned the

[6] See 123 I. C. C. 685, 693; 23 F. (2d) 874, 876.

Commission for help. In reopening the proceedings, the Commission notified the parties that one of the issues to be decided was "what rates shall be established to comply with [its] findings and order." The carriers have accepted the rate fixed by the Commission. In prescribing the rate, the Commission in no way prejudiced any pre-existing rights or remedies of the appellants. Any question as to the reasonableness of the level of the rate was expressly left open by the Commission.[7] It did not prescribe any rate as the minimum. If appellants are aggrieved by the level of the new rates, they still have their remedy before the Commission under §§ 13 and 15 of the Act.

Third. The appellants urged a further objection. In order to avoid congestion in heavy traffic periods and undue detention of cars, shippers from uptown warehouses customarily deliver their cotton to shipside by dray or barge, in lieu of switching by the carriers; and they are paid allowances by the carriers for this substituted service. The Commission's first report stated: "This finding is not to be construed as condemning the practice of the carriers of absorbing drayage charges in lieu of switching." 100 I. C. C. 159, 167. In its second report, the Commission reaffirmed this position. But in response to questions raised by the carriers, it stated that no allowances could lawfully be made with respect to what it termed the "intraplant" movement by hand truck, overhead trolley, etc., to ship-side from warehouses and compresses on and adjacent to the wharves operated as part

[7] The Commission said, with reference to the rate, "the . . . finding is without prejudice to further inquiry into the reasonableness of the above rates in connection with other cases now pending." 123 I. C. C. 685, 695.

of such warehouses or compresses.[8] Appellants urge that this prohibition is arbitrary and should be enjoined.

The question of these allowances was only incidentally raised in the proceedings before the Commission. It made no order with respect to them. The statements complained of appear only in the report and are not specifically referred to in the order. The Commission recognized the right of shippers to allowances for substituted transportation service furnished by them. It did not undertake to define what such services might be for all cases. Nor did it specifically refer to the services rendered by any of the appellants. Indeed, appellants insist that their warehouses or compresses are not operated as part of or in conjunction with the adjacent wharves or piers. If, under their contracts with carriers, the appellants perform services which properly should be performed by the carriers, the appellants are free to demand allowances therefor and to enforce their demands by appropriate proceedings before the Commission and in the courts. In such proceedings, specific issues will be presented and decided.

The decree below dismissed the consolidated suit on the merits. As the matter insofar as it relates to the bill filed by these appellants has become moot since the decree was entered, the decree, should be reversed, so far as it

[8] "But upon cotton delivered to shipside from and by water-front warehouses or compresses over adjacent wharves or piers operated as a part of, or in conjunction with, such warehouses or compresses, a different condition exists. The hand or electric trucking, or movement by overhead trolley, from the part of the water-front facility known as the warehouse or compress to that part known as the wharf is not a substitute for rail transportation, but is an intraplant movement just the same as the handling of cotton from the interior of an uptown warehouse to the railroad car or dray is an intraplant movement. No allowance may lawfully be made for these intraplant movements." 123 I. C. C. 685, 697.

concerns appellants; and the District Court should be directed to dismiss their bill without costs. See *United States* v. *Anchor Coal Co.*, 279 U. S. 812. So far as concerns the carriers—no appeal having been taken by them—the decree entered below should stand.

Reversed with direction to dismiss.

The CHIEF JUSTICE did not take part in this case.

MILLER *v.* McLAUGHLIN, SECRETARY OF THE DEPARTMENT OF AGRICULTURE OF NEBRASKA, ET AL.

CERTIORARI TO THE SUPREME COURT OF NEBRASKA.

No. 261. Argued February 28, March 3, 1930.—Decided April 14 1930.

Iowa and Nebraska are bounded by the middle of the main channel of the Missouri River. The Act of Congress admitting Iowa into the Union gave her "concurrent jurisdiction on" the river. An Iowa statute made it lawful for any person to take fish with nets and seines from the river, within the jurisdiction of the State, upon procuring a license. A Nebraska statute forbade the taking of fish with nets and seines from the waters within the State and prohibited the possession of nets and seines. This suit was brought by a resident of Nebraska to enjoin enforcement of the Nebraska statute. *Held:*

1. That the two statutes as applied to the Missouri River, though not concurrent, are not inconsistent, each relating only to the part of the river within the jurisdiction of the State enacting it, and that the Nebraska prohibition is valid at least as against residents of Nebraska. P. 263.

2. That a State may regulate or prohibit fishing within its waters, and, for the proper enforcement of such statutes, may prohibit the possession within its borders of the special instruments of violation, regardless of the time of acquisition or the protestations of lawful intentions on the part of a particular possessor. P. 264.

118 Neb. 174, affirmed.

CERTIORARI, 280 U. S. 541, to review a decree of the Supreme Court of Nebraska which reversed a decree of injunction and ordered that the bill be dismissed, in a suit to prevent the enforcement of a Nebraska statute against fishing with nets, etc.

Messrs. A. Henry Walter and *Seymour L. Smith* for petitioner.

Mr. C. A. Sorensen, Attorney General of Nebraska, with whom *Mr. George W. Ayres,* Assistant Attorney General, was on the brief, for respondents.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

The middle of the channel of the Missouri River is the boundary line between the States of Nebraska and Iowa. Act of April 19, 1864, c. 59, § 2, 13 Stat. 47; Act of August 4, 1846, c. 82, 9 Stat. 52. A Nebraska statute, prohibits the taking of "any fish except minnows from the waters within the state of Nebraska with nets, traps or seines," and made the possession of these unlawful "except as authorized by the Department of Agriculture." Laws of Nebraska (1927), c. 126, § 10, pp. 343–4. An Iowa statute provides: "It shall be lawful for any person to take from the Mississippi or Missouri rivers within the jurisdiction of this state any fish with nets or seines upon procuring from the state game warden an annual license for the use of such nets and seines." Code of Iowa (1927), § 1747.

Miller, a resident of Nebraska, brought this suit in a court of that State, on behalf of himself and others similarly situated, to enjoin the enforcement of the Nebraska statute. Its Secretary of the Department of Agriculture and Chief Game Warden were joined as defendants. Miller alleges that he has in his possession nets, traps and

seines purchased by him prior to the enactment of the law; that they are used exclusively in taking fish from the Missouri River; that he plans to use them on the Iowa side; and that the defendants are threatening to prevent their use by enforcing the statute. He claims that, in the absence of concurrence by Iowa, Nebraska is powerless to prohibit the fishing, even in that part of the Missouri River which is within its own boundaries, because, on admitting Iowa into the Union, Congress had granted it "concurrent jurisdiction on . . . every . . . river bordering on the said State of Iowa, so far as the said river[s] shall form a common boundary to said State, and any other State . . ." Act of March 3, 1845, c. 48, § 3, 5 Stat. 742, 743. He asserts that, in any event, the prohibition of the mere possession of innocuous traps, nets and seines violates the Fourteenth Amendment. The trial court issued an injunction. The Supreme Court of the State reversed the decree and directed that the bill be dismissed, 118 Neb. 174. This Court granted a writ of certiorari, 280 U. S. 541.

The grant of concurrent jurisdiction to Iowa does not deprive Nebraska of power to legislate with respect to its own residents within its own territorial limits, *Nicoulin* v. *O'Brien*, 248 U. S. 113; compare *McGowan* v. *Columbia River Packers' Assn.*, 245 U. S. 352. While the two States have not concurred in this legislation, there is no conflict between them. Each has legislated only as to that part of the river which is within its own territorial limits. It is unnecessary to consider the questions which might arise if Nebraska undertook to prohibit the fishing on Iowa's part of the river, or if Miller were a citizen of Iowa and fished under an Iowa license. Compare *Nielsen* v. *Oregon*, 212 U. S. 315. Neither Miller, nor any of the persons in whose behalf he brought the suit, have licenses from Iowa; nor does it appear that they could obtain them.

The claim under the Fourteenth Amendment is also groundless. A State may regulate or prohibit fishing within its waters, *Manchester* v. *Massachusetts*, 139 U. S. 240; *Lawton* v. *Steele*, 152 U. S. 133; *Geer* v. *Connecticut*, 161 U. S. 519; and, for the proper enforcement of such statutes, may prohibit the possession within its borders of the special instruments of violation, regardless of the time of acquisition or the protestations of lawful intentions on the part of a particular possessor, *Barbour* v. *Georgia*, 249 U. S. 454; *Samuels* v. *McCurdy*, 267 U. S. 188; compare *Lawton* v. *Steele, supra*; *Silz* v. *Hesterberg*, 211 U. S. 31; *Miller* v. *Schoene*, 276 U. S. 272.

Affirmed.

LUCAS, COMMISSIONER OF INTERNAL REVENUE, *v.* KANSAS CITY STRUCTURAL STEEL COMPANY.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

Nos. 323 and 324. Argued March 13, 14, 1930.—Decided April 14, 1930.

1. Whether in a particular business inventories are necessary for the determination of income, is a practical question left by the Revenue Act of 1918, § 203, to the judgment of the Commissioner of Internal Revenue. P. 268.
2. The "base stock" method of inventory, using a constant price for a so-called normal quantity of goods or materials in stock, is inconsistent with the annual accounting required by Congress for income tax purposes. *Id.*
3. A company engaged in the business of fabricating and erecting steel plates for buildings, bridges, etc., under contracts therefor, ordered the materials for each particular job from the mills, but aimed to keep an emergency stock on hand for use when mill shipments were delayed, etc., and to keep it replenished from such shipments. Although no part of the material was earmarked and set aside as a "stand-by" stock, but all was commingled and indiscriminately used in production, so much of it as fell within the amount on hand at the close of 1916 was inventoried each year,

until 1921, at the 1916 cost, and the excess at cost or market price, whichever was lower. The quantities in stock fluctuated from much below to much above that of 1916. In 1918 and 1920, the tax years in question, the stock inventoried at the 1916 cost was revalued by the Commissioner at the current market price, in the absence of a showing of actual cost, with consequent increase of income taxes. *Held* that inventories were properly required and the Commissioner's action was properly sustained. P. 269.

4. A taxpayer appealing from an order of the Board of Tax Appeals sustaining an increased income tax resulting from changes made by the Commissioner in the taxpayer's inventory, has the burden of proving that the Commissioner's action was plainly arbitrary. P. 271.

33 F. (2d) 53, reversed.

CERTIORARI, 280 U. S. 543, to review a judgment of the Circuit Court of Appeals which reversed a decision of the Board of Tax Appeals, 11 B. T. A. 877, sustaining increases of income taxes, based on revised inventory valuations.

Solicitor General Hughes, with whom *Assistant Attorney General Youngquist, Messrs. Sewall Key* and *Randolph C. Shaw,* Special Assistants to the Attorney General, *Clarence M. Charest,* General Counsel, Bureau of Internal Revenue, and *Allin H. Pierce,* Special Attorney, Bureau of Internal Revenue, were on the brief, for petitioner.

Mr. Armwell L. Cooper, with whom *Messrs. Ellison A. Neel, Wm. E. Kemp, Wallace Sutherland,* and *John P. Cooper* were on the brief, for respondent.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

The Kansas City Structural Steel Company, a Missouri concern, appealed to the United States Board of Tax Appeals from determinations by the Commissioner of Internal Revenue which made an increase of $7,656.74 in

the company's 1918 income tax and of $15,953.36 in its 1920 income tax.[1] These additions were due wholly to changes made by the Commissioner in the inventory valuation of material carried in stock. The Company valued at a constant price all the material which did not exceed in quantity what was said to be the normal stock on hand.[2] The Commissioner revalued this at current market prices. The changes resulted in increasing the December, 1918, inventory by $165,849.46 and the December 31, 1920, inventory by $117,113.61. The Board of Tax Appeals sustained the Commissioner's action. 11 B. T. A. 877. Its decision was reversed by the United States Circuit Court of Appeals for the Eighth Circuit. 33 F. (2d) 53. This Court granted writs of certiorari, 280 U. S. 543.

Section 203 of the Revenue Act of 1918, Feb. 24, 1919, c. 18, 40 Stat. 1057, 1060, provides: "That whenever in the opinion of the Commissioner the use of inventories is necessary in order clearly to determine the income of any taxpayer, inventories shall be taken by such taxpayer upon such basis as the Commissioner, with the approval of the Secretary, may prescribe as conforming as nearly as may be to the best accounting practice in the trade or business and as most clearly reflecting the income."[3] Regulations 45 (1920 edition, as amended by Treasury

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[1] Other matters were in dispute before the Commissioner and the Board, but these are the only disputed items carried to the Circuit Court of Appeals and presented for our decision. No. 323 involves the tax for 1918; No. 324, that for 1920. Except for the years and the amounts the facts in the two cases are identical.

[2] The system followed, if intended as a method of inventory, is known to accounting as the "base stock," "minimum" or "cushion" method.

[3] This provision was incorporated in every Revenue Act since 1918. 1921, c. 136, § 203, 42 Stat. 227, 231; 1924, c. 234, § 205, 43 Stat. 253, 260; 1926, c. 27, § 205, 44 Stat. 9, 16; 1928, c. 852, § 22 (c), 45 Stat. 791, 799. Although no similar provision was made in earlier acts, regulations of the Department supplied it. Internal Revenue Bureau, Regulations 31, arts. 2 (3) & (4); Regulations 33, art. 161; Regulations 33 (Revised), art. 91, 92, 120.

Decision 3296) provides, in Article 1581, that "inventories at the beginning and end of each year are necessary in every case in which the production, purchase, or sale of merchandise is an income-producing factor." Article 1582 declares that the basis of valuation "most commonly used by business concerns and which meets the requirements of the revenue act is (*a*) cost or (*b*) cost or market, whichever is lower"; that "goods taken in the inventory which have been so intermingled that they cannot be identified with specific invoices will be deemed to be . . . the goods most recently purchased"; that the "taxpayer must satisfy the commissioner of the correctness of the prices adopted"; and that: "(*d*) Using a constant price or nominal value for a so-called normal quantity of materials or goods in stock" is not in accord with the regulations.[4]

The Company is engaged in the fabrication and erection of steel plates for buildings, bridges, tanks, etc. It does not carry finished products in stock, but fabricates the plates for specific structures or contracts. It orders material from the mills for each structure or contract; but it also keeps a supply on hand in order "to insure the prompt and orderly execution of contracts in view of delay, etc., incident to shipments from the mills and other exigencies affecting the availability for use when needed of material ordered for a particular job." Material is taken from this supply as and when needed; and the stock is subsequently replenished.[5] On December 31,

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[4] The provision relative to the valuation of inventories at a constant price was, in effect, a restatement of a Treasury ruling promulgated in September, 1919, as Advisory Tax Board Ruling No. 65, T. B. R. 65, C. B. 1, 51.

[5] The stipulated facts recite: "When such material is used it is charged to the contract at its replacement cost and is promptly replaced with material of a like kind and in a like quantity." The phrase "charged to the contract" evidently means that it is so charged in those accounts on the Company's books which are designed to guide it in determining the cost of a particular job.

1916, the quantity in stock was 5,554 tons. The Company then inventoried it at cost—$1.70 per hundredweight f. o. b. Pittsburgh. At the close of each year thereafter until 1921, the Company inventoried its stock on hand up to 5,554 tons at that price, regardless of its actual cost or the market, and the excess, if any, at cost or market price, whichever was lower. In the tax years in question, the market was much higher. It is not shown what the actual cost of the stock then on hand was, or that any of it had cost as little as $1.70.[6] The Commissioner therefore revalued the entire stock at market price, with the consequent increase in the taxes complained of.

First. Whether in a particular business inventories are necessary for the determination of income is a practical question left by the statute to the judgment of the Commissioner. On that question, he and the Company did not differ. In every year, it, without any question or protest, used inventories in making its return. The dispute was merely on the method of valuation to be adopted for that part of the stock which it calls its normal stock. Throughout, the Company valued at cost or market prices all stock in excess of 5,554 tons; and since 1921 has so valued all the stock on hand.

It is not contested that if inventories are necessary in order to determine the Company's income, the "base stock" method does not fulfill the desiderata. The Federal income tax system is based upon an annual accounting period. This requires that gains or losses be accounted for in the year in which they are realized. The purpose of the inventories is to assign to each period its profits and losses. In years of rising prices, the "base stock"

[6] In September, 1917, the Government fixed the price of structural shapes, f. o. b. Pittsburgh at $3 per hundredweight and of tank plates at $3.25. After relinquishment of Government control, the prices fell. Those in 1920 were, for structural steel $2.45, for tank plates $2.65. In 1921 the prices fell to $1.50.

method causes an understatement of income; for it disregards the gains actually realized through liquidation of low price stock on a high price market. In times of falling prices, it causes an overstatement of income; for it ignores the losses which result from the consumption of high price stock. This method may, like many reserves which business men set up on their books for their own purposes, serve to equalize the results of operations during a series of years. But it is inconsistent with the annual accounting required by Congress for income tax purposes. It results in offsetting an inventory gain of one year against an inventory loss of another, obscures the true gain or loss of the tax year and, thus, misrepresents the facts. It does not conform with the general or best accounting methods and is apparently obsolete.[7] The Company disclaims any defense of the base stock method; and the lower court disapproved it.

Second. It is urged, however, that the inventory requirement is not applicable to the Company's stock to the extent of 5,554 tons; that the Company is not a dealer, manufacturer or producer, but rather a contractor or builder; that its income results from the performance of its construction contracts; that the material in its stand-by stock has no relation to these contracts, the contract prices, or the Company's profits; that the material from this stock is only borrowed for specific jobs and is promptly replaced in kind; that it is not an income pro-

[7] In a well reasoned report, the Advisory Tax Board, in 1919, ruled that the "base stock" "minimum" or "cushion" method did not withstand "the changing tests of time" and could not be approved. Since then, all Regulations of the Department expressly prohibited its use. See Regulations 45, art. 1582; Regulations 62, art. 1582; Regulations 65, art. 1612; Regulations 69, art. 1612; Regulations 74, art. 102. No case has been found in which any business concern has challenged the correctness of these prohibitions and they have been approved by accountants. 1 Montgomery, Income Tax Procedure (1926 ed.) 712; Klein, Federal Income Taxation (1929), ¶ 14: 13(d), p. 375.

ducing factor, but is like the Company's machinery and equipment; and that any accretion to the value of this material is of no consequence until a final liquidation. The contentions are inconsistent with the Company's practice and are unsound.

The Company's purchase and production of steel plates is obviously an income producing factor. Throughout the years, the Company has varying amounts of material on hand. The value of the particular material used, at the time of use, plainly affects its profits. That the material is replaced in kind and its amount kept within some limits is not exceptional and is of no significance. Most concerns strive ordinarily to carry no more stock than is required for the safe and profitable conduct of the business. They plan neither to run short nor to overstock. They replace supplies as they are consumed. And the cost or value of the new material is properly reflected in the later inventories and returns. There is nothing peculiar about the 5,554 tons,—except that that happened to be the amount of stock on hand on December 31, 1916. It is not a permanent stock, like machinery or equipment. Nor is it merely depleted by borrowing and promptly restored to that fixed size. On the contrary, the stock has fluctuated from about 3,000 tons in 1918 to 11,000 tons in 1920.[8] There is no stand-

[8] The quantities on hand at the end of each of the several years were:

December 31, 1916	5,554 tons
December 31, 1917	5,298 tons
December 31, 1918	5,887 tons
December 31, 1919	6,957 tons
December 31, 1920	7,246 tons
December 31, 1921	4,512 tons
December 31, 1922	9,341 tons
December 31, 1923	8,732 tons
December 31, 1924	10,411 tons
December 31, 1925	7,202 tons
December 31, 1926	8,126 tons

by stock set aside and earmarked as such. The material is all commingled and is indiscriminately used in production, as and when needed. No reason is given for excepting 5,554 tons—no more and no less. To draw an artificial line at that amount would distort the computation of income in the accounting periods, although the errors might be equalized in a series of years. Since inventories are properly deemed necessary, the exception of that or any amount is nothing but the use of the discarded "base stock" method.

The Company's case falls far short of meeting the heavy burden of proving that the Commissioner's action was plainly arbitrary. Compare *Lucas* v. *American Code Co.*, 280 U. S. 445, 449; *Williamsport Wire Rope Co.* v. *United States*, 277 U. S. 551, 559.

Reversed.

The CHIEF JUSTICE did not take part in this case.

MEADOWS *v.* UNITED STATES.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. 269. Argued March 5, 1930.—Decided April 14, 1930.

1. The District Court is without jurisdiction to review a decision of the Director of the Veterans' Bureau, denying (under § 408 of the Act of 1921, carried into the Act of 1924 as § 304, c. 320, 43 Stat. 607, 625; U. S. C., Title 38, § 515) an application for reinstatement of a lapsed policy on the ground that the applicant, at the time of making the application, was totally and permanently disabled. P. 273.
2. Section 19 of the World War Veterans' Act of 1924, as amended, U. S. C., Title 38, § 445, which confers jurisdiction upon the District Courts to hear and determine controversies arising out of claims under contracts of insurance in the event of disagreement between the Bureau and claimants, does not apply to a claim for reinstatement of a lapsed policy. P. 274.

32 F. (2d) 440, affirmed.

CERTIORARI, 280 U. S. 550, to review a judgment of the Circuit Court of Appeals which, on the ground that the trial court was without jurisdiction, reversed and directed dismissal of a judgment of the District Court against the United States in an action to require the reinstatement of a lapsed War Risk Insurance policy.

Mr. Charles Kerr presented the oral argument, and *Messrs. Jean S. Breitenstein, S. R. Owens,* and *Lowell D. Hunt* were on the brief, for petitioner.

Mr. Claude R. Branch, Special Assistant to the Attorney General, with whom *Attorney General Mitchell* and *Messrs. J. Frank Staley* and *W. Clifton Stone* were on the brief, for the United States.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

Petitioner brought this action against the respondent in a federal district court to require the reinstatement of a lapsed insurance policy issued under the War Risk Insurance Act of October 6, 1917, c. 105, § 400, 40 Stat. 398, 409; amended August 9, 1921, c. 57, § 27, 42 Stat. 147, 156, 157. It was alleged that, being enlisted in the United States army during the World War, he applied for and obtained, under the act, a policy of insurance in the sum of $10,000 against death and permanent and total disability. Thereafter, on February 1, 1920, $3,000 of this amount was converted into a 20-payment life policy, and the remaining $7,000 was allowed to lapse. In March, 1923, petitioner applied to the Director of the United States Veterans' Bureau for reinstatement of the policy in respect of the $7,000, asserting that he was then suffering from a disability of a degree less than permanent and total. The director of the bureau rejected the ap-

plication and thereupon petitioner brought this action. The government answered, denying certain allegations and admitting others, and alleging that at the time of the application for reinstatement, and for a long time prior thereto, petitioner was permanently and totally disabled.

The case was tried by the court without a jury, and judgment rendered reinstating the policy to the extent of $7,000. The circuit court of appeals reversed the judgment upon the ground that the trial court was without jurisdiction, and directed a dismissal of the petition. 32 F. (2d) 440.

Prior to the amending act of 1921, there was no statutory provision for the reinstatement of lapsed policies, but the matter was one of bureau regulation. By § 408 of that act, carried into the act of 1924 as § 304, c. 320, 43 Stat. 607, 625 (U. S. Code, Title 38, § 515), it was provided:

"In the event that all provisions of the rules and regulations other than the requirements as to the physical condition of the applicant for insurance have been complied with, an application for reinstatement, in whole or in part, of lapsed or canceled yearly renewable term insurance or United States Government life insurance (converted insurance) hereafter made may be approved if made within one year after the passage of this Act or within two years after the date of lapse or cancellation: . . . *Provided further,* That the applicant during his lifetime submits proof satisfactory to the director showing . . . that the applicant is not totally and permanently disabled."

The director denied the application on the ground that the applicant, at the time of making it, was totally and permanently disabled. The trial court held the contrary. The evidence upon which the director acted was

not before the court, but the case was decided upon original evidence introduced upon the trial. The question was purely one of fact, which the director was authorized to determine; and his decision, unless within § 19 of the World War Veterans' Act of 1924, dealt with below, was final and conclusive. *United States* v. *Williams,* 278 U. S. 255; *Silberschein* v. *United States,* 266 U. S. 221, 225,

Section 19 of the act of 1924, as amended March 4, 1925, c. 553, § 2, 43 Stat. 1302 (U. S. Code, Title 38, § 445), provides in part:

"In the event of disagreement as to claim under a contract of insurance between the Bureau and any person or persons claiming thereunder an action on the claim may be brought against the United States either in the Supreme Court of the District of Columbia or in the District Court of the United States in and for the district in which such persons or any one of them resides, and jurisdiction is hereby conferred upon such courts to hear and determine all such controversies."

This provision, we think, has nothing to do with an application for reinstatement of a defunct policy. The right to reinstatement, when it exists, flows from the statutory provision and not from any undertaking expressed in the contract of insurance. No doubt, the policy holder may have the benefit of the statute, although passed subsequently to the issue of the policy, *White* v. *United States,* 270 U. S. 175, 180; but a reinstatement under the provisions of the statute would be not the fulfillment of a contractual obligation but, in effect, the making of a new contract by statutory sanction.

Aetna Life Ins. Co. v. *Dunken,* 266 U. S. 389, upon which petitioner here relies, is not to the contrary. There the original policy of insurance was a seven-year term

policy. It provided expressly that upon any anniversary of its date, at the sole option of the insured, without medical reëxamination, it was convertible into a twenty payment life commercial policy, etc. It was held that the converted policy was merely a continuation of the old one. This court said (p. 399):

"In effect, it is as though the first policy had provided that upon demand of the insured and payment of the stipulated increase in premiums that policy should, automatically, become a twenty payment life commercial policy. It was issued not as the result of any new negotiation or agreement but in discharge of preëxisting obligations. It merely fulfilled promises then outstanding; and did not arise from new or additional promises. The result in legal contemplation was not a novation but the consummation of an alternative specifically accorded by, and enforceable in virtue of, the original contract. If the insurance company had refused to issue the second policy upon demand, the insured could have compelled it by a suit in equity for specific performance."

The situation in the present case is altogether different. The original policy had come to an end; liability under it had wholly ceased; a new application was required, together with proof of an existing condition sufficient to satisfy the director, before reinstatement could be made. The effect of the statute is to accord the privilege of reinstatement to the holder of a lapsed policy, not to read into it a promise to that end. The existence of the old policy is, of course, a necessary prerequisite to the consideration of a claim for the allowance of the statutory privilege, but the claim is one under the statute, not under the contract, and, consequently, does not fall within the terms of § 19.

Judgment affirmed.

PATTON ET AL. *v.* UNITED STATES.

CERTIFICATE FROM THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. 53. Argued February 25, 1930.—Decided April 14, 1930.

1. After the commencement of a trial in a federal court before a jury of twelve men upon an indictment charging a crime, punishment for which may involve a penitentiary sentence, if one juror becomes incapacitated and unable to proceed further with his work as a juror, the defendant and the Government, through its official representative in charge of the case, may consent to the trial's proceeding to a finality with eleven jurors, and defendant thus may waive the right to a trial and verdict by a constitutional jury of twelve men. P. 287 *et seq.*
2. The phrase "trial by jury," as used in the Federal Constitution (Art. III, § 2, and the Sixth Amendment) means a trial by jury as understood and applied at common law, and includes all the essential elements as they were recognized in this country and England when the Constitution was adopted; *viz:* (1) that the jury should consist of twelve men, neither more nor less; (2) that the trial should be in the presence and under the superintendence of a judge having power to instruct them as to the law and advise them in respect of the facts; and (3) that the verdict should be unanimous. P. 288.
3. These common law elements of a jury trial are embedded in the provisions of the Federal Constitution relating thereto, and are beyond the authority of the legislative department to destroy or abridge. P. 290.
4. There is no difference in substance between a complete waiver of a jury and consent to be tried by a less number than twelve. *Id.*
5. A question involving a claim of constitutional right cannot be settled by the simple process of ascertaining that the infraction assailed is unimportant when compared with similar but more serious infractions which might be conceived; to uphold the voluntary reduction of a jury from twelve to eleven upon the ground that the reduction is only a slight reduction, is not to interpret the Constitution, but to disregard it. P. 292.
6. The effect of the constitutional provisions in respect of trial by jury is not to establish a tribunal as a part of the frame of govern-

ment, but only to guarantee to the accused the right to such a trial. P. 293.

7. The first ten amendments and the original Constitution were substantially contemporaneous, and should be construed *in pari materia*. P. 298.
8. The provision of Art. III, § 2, of the Constitution, relating to trial by jury, is not jurisdictional, but was meant to confer a right upon the accused which he may forego at his election. *Id.*
9. A federal district court has authority in the exercise of a sound discretion to accept a waiver of jury trial in a criminal case, and to proceed to the trial and determination of the case with a reduced number or without a jury, the grant of jurisdiction by § 24 of the Judicial Code, U. S. C., Title 28, § 41 (2), being sufficient to that end. P. 299.
10. The view that power to waive a trial by jury in criminal cases should be denied on grounds of public policy is rejected as unsound. P. 308.
11. The power of waiver of jury trial by the defendant in a criminal case is applicable to cases of felonies as well as to misdemeanors. P. 309.
12. Before a waiver of jury trial in a criminal case can become effective, the consent of government counsel and the sanction of the court must be had, in addition to the express and intelligent consent of the defendant, and the duty of the trial court in this regard is to be discharged with a sound and advised discretion. P. 312.

ANSWER to a question certified by the Circuit Court of Appeals upon review of a judgment of the District Court imposing sentence in a criminal prosecution for conspiring to bribe a federal prohibition agent.

Mr. Claude Nowlin, with whom *Messrs. Jacob R. Spielman* and *M. M. Thomas* were on the brief, for Patton et al.

Where defendants are tried in the United States District Court for a felony upon their plea of not guilty, the jurisdiction of the court to pronounce judgment of conviction and sentence upon them rests upon a unanimous verdict of guilty duly returned by a constitutional jury of twelve, and no agreement between the representative of the Government and the defendants and their counsel

can change the tribunal provided by the Constitution so as to confer jurisdiction upon the court to pronounce judgment and sentence upon a finding of guilty by eleven jurors. Citing: *Thompson* v. *Utah,* 170 U. S. 343; *Maxwell* v. *Dow,* 176 U. S. 581; *Low* v. *United States,* 169 Fed. 86; *Cancemi* v. *People,* 18 N. Y. 128; *Rassmussen* v. *United States,* 197 U. S. 516; *Frank* v. *United States,* 192 Fed. 864; *Dickinson* v. *United States,* 159 Fed. 801; *Freeman* v. *United States,* 227 Fed. 732; *Lamb* v. *Lane,* 4 Oh. St. 167; *Capital Traction Co.* v. *Hof,* 174 U. S. 13; *Crain* v. *United States,* 162 U. S. 625; *Grove* v. *United States,* 3 F. (2d) 965; *Gibson* v. *United States,* 31 F. (2d) 19; *Montana* v. *Ah Wah,* 4 Mont. 149; *State* v. *Mansfreed,* 41 Mo. 470; *Hill* v. *People,* 16 Mich. 357.

Distinguishing: *Commonwealth* v. *Daily,* 12 Cush. 80; *Queenan* v. *Oklahoma,* 190 U. S. 548; *Schick* v. *United States,* 195 U. S. 65; *State* v. *Kaufman,* 51 Iowa 578; *Diaz* v. *United States,* 223 U. S. 442.

Solicitor General Hughes, with whom *Messrs. George C. Butte,* Special Assistant to the Attorney General, *Robert P. Reeder,* and *Erwin N. Griswold* were on the brief, for the United States.

The Federal Constitution gives a defendant charged with such an offense as is here involved, an inviolable right to trial by a jury of twelve, but does not preclude his express waiver thereof. It is conceded that the defendants, being charged with felonies of a serious nature, were entitled to trial before a jury of twelve. *Callan* v. *Wilson,* 127 U. S. 540; *Thompson* v. *Utah,* 170 U. S. 343; *Maxwell* v. *Dow,* 176 U. S. 581; *Rassmussen* v. *United States,* 197 U. S. 516.

Decisions of this Court and of other courts tend to support the conclusion that the Constitution does not preclude waiver of a jury trial. *Diaz* v. *United States,* 223 U. S. 442; *Schick* v. *United States,* 195 U. S. 65. Dis-

tinguishing *Thompson* v. *Utah*, 170 U. S. 343. See also *In re Belt*, 159 U. S. 95; *Territory* v. *Soga*, 20 Hawaii 71.

Decisions of the lower federal courts generally are conflicting. *Low* v. *United States*, 169 Fed. 86; *Coates* v. *United States*, 290 Fed. 134; *United States* v. *Praeger*, 149 Fed. 474; *United States* v. *Shaw*, 59 Fed. 110. In the territorial courts the waiver of a jury in a misdemeanor case was upheld in *Ex parte Dunlap*, 5 Alaska 521; but in *In re Virch*, 5 Alaska 500, and *In re McQuown*, 19 Okla. 347, such a waiver was held invalid.

In decisions involving the validity of trials before a jury of eleven with the defendant's consent, conclusions negativing the validity of the waiver of jury trial have been expressed by the majority of the court in *Dickinson* v. *United States*, 159 Fed. 801, and in two decisions by territorial courts. *Territory* v. *Ah Wah*, 4 Mont. 149; *Territory* v. *Ortiz*, 8 N. M. 154.

There is substantial uniformity in the decisions of the state courts in which the question of the constitutionality of statutes providing for the waiver of the entire jury has been presented. The validity of such statutes has been expressly adjudicated in a great number of States, and in every instance the constitutionality of such a statute has been upheld. *Connelly* v. *State*, 60 Ala. 89; *Ireland* v. *State*, 11 Ala. App. 155; *Baader* v. *State*, 201 Ala. 76; *State* v. *Shearer*, 27 Ariz. 311; *State* v. *Worden*, 46 Conn. 349; *State* v. *Rankin*, 102 Conn. 46; *Logan* v. *State*, 86 Ga. 266; *Moore* v. *State*, 124 Ga. 30; *Brewster* v. *People*, 183 Ill. 143; *People* v. *Fisher*, 303 Ill. 430; *Murphy* v. *State*, 97 Ind. 579; *In re Clancy*, 112 Kan. 247; *League* v. *State*, 36 Md. 257; *Commonwealth* v. *Rowe*, 257 Mass. 172; *Ward* v. *People*, 30 Mich. 116; *People* v. *Steele*, 94 Mich. 437; *People* v. *Jones*, 220 Mich. 633; *People* v. *Henderson*, 246 Mich. 481; *State* v. *Woodling*, 53 Minn. 142; *State* v. *Graves*, 161 Minn. 422; *State* v. *Moody*, 24 Mo. 560;

State v. *Bockstruck,* 136 Mo. 335; *Edwards* v. *State,* 45 N. J. L. 419; *Miller* v. *State,* 3 Oh. St. 475; *Dailey* v. *State,* 4 Oh. St. 57; *Dillingham* v. *State,* 5 Oh. St. 280; *Billigheimer* v. *State,* 32 Oh. St. 435; *Hoffman* v. *State,* 98 Oh. St. 137; *Lee* v. *State,* 86 Tex. Cr. Rep. 203; *Armstrong* v. *State,* 98 Tex. Cr. Rep. 335; *State* v. *Griggs,* 34 W. Va. 78; *State* v. *Denoon,* 34 W. Va. 139; *In re Staff,* 63 Wis. 285.

In civil cases, the only constitutional provision is that of the Seventh Amendment providing that "the right of trial by jury shall be preserved," but it is provided by a statute which is applicable both to civil and criminal cases that "the trial of issues of fact . . . shall be by jury." Act of September 24, 1789, c. 20, §§ 9, 12, 1 Stat. 73; Rev. Stats. §§ 566, 648, U. S. C., Title 28, § 770. Thus, trial by jury is prescribed by statute in civil cases in identically the same terms as those in which it is prescribed for criminal cases by the Third Article of the Constitution. But this Court has uniformly held that this statute does not prevent the waiver of the jury in civil cases if the parties so desire. *Guild* v. *Frontin,* 18 How. 135; *Campbell* v. *Boyreau,* 21 How. 223; *Kearney* v. *Case,* 12 Wall. 275; *Bond* v. *Dustin,* 112 U. S. 604; *Perego* v. *Dodge,* 163 U. S. 160; *Comm'rs of Road Dist.* v. *St. Louis S. W. Ry. Co.,* 257 U. S. 547; *Law* v. *United States,* 266 U. S. 494; *Duignan* v. *United States,* 274 U. S. 195; *Schick* v. *United States,* 195 U. S. 65.

The Sixth Amendment was substantially contemporaneous with the original Constitution and *in pari materia* with the jury provision in the Third Article. That the amendment was phrased in terms of right is strong indication that the original clause had no different purpose. If so, there is no reason why the right to trial by jury should be regarded as standing upon any different footing than other rights conferred by the Fifth, Sixth, and Seventh Amendments, which have been held to be waivable. *Trono* v. *United States,* 199 U. S. 521; *Fitz-*

patrick v. *United States,* 178 U. S. 304; *Powers* v. *United States,* 223 U. S. 303; *Worthington* v. *United States,* 1 F. (2d) 154; *Phillips* v. *United States,* 201 Fed. 259; *Diaz* v. *United States,* 223 U. S. 442.

If it be assumed that the constitutional provisions for trial by jury should be construed as guaranteeing a right, there is no valid reason why their benefit should not be waivable. The argument usually advanced to support the contrary view is that the matter concerns the public as well as the individual, and that "no one has a right, by his own voluntary act, to surrender his liberty or part with his life." *Cancemi* v. *People,* 18 N. Y. 128. But unless the intention of the Constitution was to require trial by jury in such sense that its absence goes to the jurisdiction of the court, the argument fails. A man may effectively "by his own voluntary act surrender his liberty or part with his life" by pleading guilty. No public policy forbids this, and a defendant's right so to do is nowhere forbidden by the Constitution.

The historical background of the constitutional provisions tends to support the view that their purpose was to create a right and not a mandatory requirement.

Waiver of trial by jury, even in trials for serious offenses, was not unknown in Colonial times, and at the time of the adoption of the Constitution. F. W. Grinnell, in 8 Mass. L. Q., No. 5, p. 7, 1923; *Commonwealth* v. *Rowe,* 257 Mass. 172; "Body of Liberties" of 1641, printed in Colonial Laws of Mass. (Boston, 1889) 29; Laws and Liberties of Massachusetts of 1648 (reprinted in Cambridge in 1929), p. 51; Revision of 1660, p. 77, and Revision of 1672, p. 152, reprinted in the Colonial Laws of Massachusetts, *supra;* The Compact, Charter and Laws of the Colony of New Plymouth (Boston, 1836), 242; Records of the Court of Assistants, vol. I, published by County of Suffolk, Mass., 1901, pp. 102, 104, 114–115, 285–286, Cases of Benanuel Bowers, p. 3, and of Robert

Maior, p. 84; Cutt Laws of 1679, 1 N. H. Province Laws 25; Slade, Vermont State Papers, 1823, p. 553; *State* v. *Taylor and Warren,* 1 Root 226; *State* v. *Shaw and six others,* 1 Root 134; *State* v. *Ford,* 2 Root 93; N. J. Laws, c. LIX, p. 235, c. LXXII, p. 272; Paterson, Laws, N. J., pp. 213, 221, §§ 32, 79; Bond, Maryland Practice of Trying Criminal Cases, etc., 11 A. B. A. J. 699; *Hudson* v. *United States,* 272 U. S. 451; *Jenifer* v. *The Lord Proprietary,* 1 H. & McH. 535; *Miller* v. *The Lord Proprietary,* 1 H. & McH. 543; *State* v. *Tibbs,* 3 H. & McH. 83; Md. Laws, 1781, c. XI.

The Maryland practice since the eighteenth century has had a continuous development into the modern trial by the court. In the year 1924 over 90 per cent. of all the cases tried in the Criminal Court of Baltimore City were tried without a jury (11 A. B. A. J. 701) under this procedure which finds its origin quite definitely in the provincial practice.

See also, *Proprietor* v. *Wilkins,* (1685/6) p. 88, Pennypacker's Colonial Cases, Phila., 1892; *Respublica* v. *Askew,* 2 Dall. 189.

It may be argued that, even though waiver of the entire jury in advance of trial might validly be authorized under the Constitution, the court has no jurisdiction to try a felony case without jury under the present statutes.

It is true that the weight of state court authority tends to support that view. While in a few cases (involving misdemeanors) state courts have held that trial by jury might be waived in the absence of statutory authority therefor (*Zarresseller* v. *People,* 17 Ill. 101; *Darst* v. *People,* 51 Ill. 286; see *State* v. *Potter,* 16 Kan. 80; *Metzner* v. *State,* 128 Tenn. 45; *Miller* v. *State,* 116 Neb. 702), the greater number of such decisions hold that waiver of the entire jury is invalid either because the statutes relating to jury trial are construed to be mandatory or because no express provision is made by statute for waiver. *Wilson*

v. *State,* 16 Ark. 601; *State* v. *Maine,* 27 Conn. 281; *State* v. *Carman,* 63 Iowa 130; *Commonwealth* v. *Rowe,* 257 Mass. 172; *Neales* v. *State,* 10 Mo. 498; *Commonwealth* v. *Hall,* 291 Pa. 341; *State* v. *Hirsch,* 91 Vt. 330; *Mays* v. *Commonwealth,* 82 Va. 550; *State* v. *Smith,* 184 Wis. 664. The usual ground of such decisions is that "While a defendant may waive his right to jury trial, he can not by such waiver confer jurisdiction to try him upon a tribunal which has no such jurisdiction by law." *Harris* v. *People,* 128 Ill. 585.

There are no decisions of this Court which lend support to the view that the absence of express statutory provision for the waiver of a jury or the existence of statutory provisions prescribing jury trial deprives the court sitting without a jury of jurisdiction. Indeed, its decisions tend to uphold the validity of such a waiver under the general statutes prescribing trial by jury in the lower federal courts.

Under the provisions of the Judiciary Acts, it has been held by this Court in both criminal and civil cases that a court sitting without a jury is fully organized and has jurisdiction to determine the controversy before it. *Schick* v. *United States,* 195 U. S. 65; *Guild* v. *Frontin,* 18 How. 135; *Campbell* v. *Boyreau,* 21 How. 223. See also *Rogers* v. *United States,* 141 U. S. 548 and *Campbell* v. *United States,* 224 U. S. 99.

Trials in civil cases without juries under waivers which are not in writing are still permissible, although in such cases the only questions open on appeal are those which arise on the process, pleadings, or judgment. *Kearney* v. *Case,* 12 Wall. 275; *Bond* v. *Dustin,* 112 U. S. 604; *Comm'rs of Road District* v. *St. Louis S. W. Ry. Co.,* 257 U. S. 547; *Law* v. *United States,* 266 U. S. 494; *Duignan* v. *United States,* 274 U. S. 195.

These cases are of significance on the statutory question, because of the fact that the statutory provisions re-

lating to jury trial (so far as oral waivers are concerned) are the same in both civil and criminal cases.

The result of the cases above cited is that the court, sitting without a jury upon the waiver of the parties, has jurisdiction and is fully organized to try the case.

On the facts of the present case there has been no substantial departure from the mode of trial by jury. Even if waiver of the entire jury in advance of trial were held to be unauthorized either by the Constitution or by the statutes, defendants' right to waive an irregularity of the sort here involved should be recognized.

The considerations above stated have led many state courts to hold that where, through unavoidable and unforeseeable circumstances, a juror has become unable to serve, the defendant may validly waive his continued presence and the verdict of the remaining eleven is valid. Many of these cases were decided on grounds equally applicable to the waiver of the entire jury. But in others the rationale of the decision seems to be that there has been a substantial compliance with the system of trial by jury.

In the following cases a verdict rendered by eleven members of a jury with the consent of the defendant was upheld: *State* v. *Kaufman,* 51 Iowa 578; *State* v. *Grossheim,* 79 Iowa 75; *State* v. *Browman,* 191 Iowa 608; *Commonwealth* v. *Dailey,* 12 Cush. 80; *Commonwealth* v. *Lawless,* 258 Mass. 262; *State* v. *Sackett,* 39 Minn. 69; *Miller* v. *State,* 116 Neb. 702; *State* v. *Borowsky,* 11 Nev. 119; *State* v. *Baer,* 103 Oh. St. 585; *Commonwealth* v. *Egan,* 281 Pa. 251; *Commonwealth* v. *Beard,* 48 Pa. Sup. Ct. 319; *State* v. *Ross,* 47 S. D. 188; *State* v. *Tiedeman,* 49 S. D. 356.

On the other hand, a number of state decisions have taken the opposite position. Some of these cases are distinguishable for it appears that the trial began with less than twelve jurors. *Cleghorn* v. *State,* 22 Ala. App. 439;

Brown v. *State,* 16 Ind. 496; *Hunt* v. *State,* 61 Miss. 577; *State* v. *Sanders,* 243 S. W. 771; see also *State* v. *Wyndham,* 80 W. Va. 482. But in other cases it appears that the presence of the twelfth juror was waived during the course of the trial. *Allen* v. *State,* 54 Ind. 461; *State* v. *Mansfield,* 41 Mo. 470; *Cancemi* v. *People,* 18 N. Y. 128; *State* v. *Rogers,* 162 N. C. 656; *State* v. *Hall,* 137 S. C. 261; *Jones* v. *State,* 52 Tex. Cr. Rep. 303; *Dunn* v. *State,* 88 Tex. Cr. Rep. 21; *State* v. *Ellis,* 22 Wash. 129; *Jennings* v. *State,* 134 Wis. 307.

In Kansas the waiver of one juror during the trial has been held valid in the case of a misdemeanor, *State* v. *Wells,* 69 Kan. 792, but invalid in that of a felony. *State* v. *Simons,* 61 Kan. 752. Cf. *Murphy* v. *Commonwealth,* 1 Met. 365; *Tyra* v. *Commonwealth,* 2 Met. 1; *Phipps* v. *Commonwealth,* 205 Ky. 832; *Branham* v. *Commonwealth,* 209 Ky. 734; *Jackson* v. *Commonwealth,* 221 Ky. 823.

There is a conflict of decisions under the Federal Constitution. *Dickinson* v. *United States,* 159 Fed. 801; *Territory* v. *Ah Wah,* 4 Mont. 149; *Territory* v. *Soga,* 20 Hawaii 71; *Territory* v. *Ortiz,* 8 N. M. 154. Cf. *State* v. *Kaufman,* 51 Iowa 578; *State* v. *Carman,* 63 Iowa 130; *State* v. *Sanigan,* 66 Iowa 426; *State* v. *Grossheim,* 79 Iowa 75; *State* v. *Browman,* 191 Iowa 608; *State* v. *Williams,* 195 Iowa 374; *State* v. *Stricker,* 196 Iowa 290; *Commonwealth* v. *Dailey,* 12 Cush. 80; *Commonwealth* v. *Rowe,* 257 Mass. 172; *Commonwealth* v. *Lawless,* 258 Mass. 262; *State* v. *Borowsky,* 11 Nev. 119; *Commonwealth* v. *Beard,* 48 Pa. Sup. Ct. 319; *Commonwealth* v. *Egan,* 281 Pa. 251; *Commonwealth* v. *Hall,* 291 Pa. 341; *State* v. *Baer,* 103 Oh. St. 585; *State* v. *Ross,* 47 S. D. 188; *State* v. *Tiedeman,* 49 S. D. 356; *Queenan* v. *Oklahoma,* 190 U. S. 548.

That a tribunal consisting of a judge and eleven jurors is not, as defendants contend, without jurisdiction, and

that a trial before such a tribunal is not a nullity or a mere arbitration is, we submit, clearly indicated by the case of *Riddle* v. *Dyche*, 262 U. S. 333.

Even if it should be held that the Constitution requires trial by jury in the case of all crimes in terms so mandatory that provision for waiver may not validly be made, or that the present statutes preclude any other form of trial, it is submitted that the present case presents no departure therefrom of such a substantial nature that it could not be waived.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

The defendants (plaintiffs in error) were indicted in a federal district court, charged with conspiring to bribe a federal prohibition agent, a crime punishable by imprisonment in a federal penitentiary for a term of years. A jury of twelve men was duly impaneled. The trial began on October 19, 1927, and continued before the jury of twelve until October 26 following, at which time one of the jurors, because of severe illness, became unable to serve further as a juror. Thereupon it was stipulated in open court by the government and counsel for defendants, defendants personally assenting thereto, that the trial should proceed with the remaining eleven jurors. To this stipulation the court consented after stating that the defendants and the government both were entitled to a constitutional jury of twelve, and that the absence of one juror would result in a mistrial unless both sides should waive all objections and agree to a trial before the remaining eleven jurors. Following this statement, the stipulation was renewed in open court by all parties. During the colloquy counsel for defendants stated that he had personally conferred with all counsel and with each of the defendants individually, and it was the desire of all to finish the trial of the case with the eleven jurors

if the defendants could waive the presence of the twelfth juror.

The trial was concluded on the following day, and a verdict of guilty was rendered by the eleven jurors. Each of the defendants was sentenced to terms of imprisonment in the penitentiary on the several counts of the indictment. An appeal was taken to the circuit court of appeals upon the ground that the defendants had no power to waive their constitutional right to a trial by a jury of twelve persons.

The court below, being in doubt as to the law applicable to the situation thus presented, and desiring the instruction of this court, has certified the following question:

"After the commencement of a trial in a Federal Court before a jury of twelve men upon an indictment charging a crime, punishment for which may involve a penitentiary sentence, if one juror becomes incapacitated and unable to further proceed with his work as a juror, can defendant or defendants and the Government through its official representative in charge of the case consent to the trial proceeding to a finality with eleven jurors, and can defendant or defendants thus waive the right to a trial and verdict by a constitutional jury of twelve men?"

The question thus submitted is one of great importance, in respect of which there are differences of opinion among the various lower federal and state courts; but which this court thus far has not been required definitely to answer. There are, however, statements in some of our former opinions, which, if followed, would require a negative answer. These are referred to and relied upon by the defendants.

The federal Constitution contains two provisions relating to the subject. Article III, Section 2, Clause 3 provides:

"The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the State where the said crimes shall have been committed; but when not committed within any State, the trial shall be at such place or places as the Congress may by law have directed."

The Sixth Amendment provides:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

Passing for later consideration the question whether these provisions, although varying in language, should receive the same interpretation, and whether taken together or separately the effect is to guaranty a right or establish a tribunal as an indispensable part of the government structure, we first inquire what is embraced by the phrase "trial by jury." That it means a trial by jury as understood and applied at common law, and includes all the essential elements as they were recognized in this country and England when the Constitution was adopted, is not open to question. Those elements were—(1) that the jury should consist of twelve men, neither more nor less; (2) that the trial should be in the presence and under the superintendence of a judge having power to instruct them as to the law and advise them in respect of the facts; and (3) that the verdict should be unanimous.

As to the first of these requisites, it is enough to cite *Thompson* v. *Utah,* 170 U. S. 343, 350, where this court

reversed the conviction of a defendant charged with grand larceny by a jury of eight men, saying:

"It must consequently be taken that the word 'jury' and the words 'trial by jury' were placed in the Constitution of the United States with reference to the meaning affixed to them in the law as it was in this country and in England at the time of the adoption of that instrument; and that when Thompson committed the offence of grand larceny in the Territory of Utah—which was under the complete jurisdiction of the United States for all purposes of government and legislation—the supreme law of the land required that he should be tried by a jury composed of not less than twelve persons."

The second requisite was expressly dealt with in *Capital Traction Company* v. *Hof*, 174 U. S. 1, 13–16, where it is said:

"'Trial by jury,' in the primary and usual sense of the term at the common law and in the American constitutions, is not merely a trial by a jury of twelve men before an officer vested with authority to cause them to be summoned and empanelled, to administer oaths to them and to the constable in charge, and to enter judgment and issue execution on their verdict; but it is a trial by a jury of twelve men, in the presence and under the superintendence of a judge empowered to instruct them on the law and to advise them on the facts, and (except on acquittal of a criminal charge) to set aside their verdict if in his opinion it is against the law or the evidence. This proposition has been so generally admitted, and so seldom contested, that there has been little occasion for its distinct assertion."

The third requisite was held essential in *American Publishing Company* v. *Fisher*, 166 U. S. 464, 468; *Springville* v. *Thomas*, 166 U. S. 707; *Maxwell* v. *Dow*, 176 U. S. 581, 586.

These common law elements are embedded in the constitutional provisions above quoted, and are beyond the authority of the legislative department to destroy or abridge. What was said by Mr. Justice Brewer in *American Publishing Company* v. *Fisher, supra,* with respect to the requirement of unanimity, is applicable to the other elements as well:

"Whatever may be true as to legislation which changes any mere details of a jury trial, it is clear that a statute which destroys this substantial and essential feature thereof is one abridging the right."

Any such attempt is vain and ineffectual, whatever form it may take. See *In re Debs,* 158 U. S. 564, 594.

The foregoing principles, while not furnishing a precise basis for an answer to the question here presented, have the useful effect of disclosing the nature and scope of the problem, since they demonstrate the unassailable integrity of the establishment of trial by jury in all its parts, and make clear that a destruction of one of the essential elements has the effect of abridging the right in contravention of the Constitution. It follows that we must reject *in limine* the distinction sought to be made between the effect of a complete waiver of a jury and consent to be tried by a less number than twelve, and must treat both forms of waiver as in substance amounting to the same thing. In other words, an affirmative answer to the question certified logically requires the conclusion that a person charged with a crime punishable by imprisonment for a term of years may, consistently with the constitutional provisions already quoted, waive trial by a jury of twelve and consent to a trial by any lesser number, or by the court without a jury.

We are not unmindful of the decisions of some of the state courts holding that it is competent for the defendant to waive the continued presence of a single juror who has become unable to serve, while at the same time deny-

ing or doubting the validity of a waiver of a considerable number of jurors, or of a jury altogether. See, for example, *State* v. *Kaufman,* 51 Iowa 578, 580, with which compare *State* v. *Williams,* 195 Iowa 374; *Commonwealth ex rel. Ross* v. *Egan,* 281 Pa. 251, 256, with which compare *Commonwealth* v. *Hall,* 291 Pa. 341. But in none of these cases are we able to find any persuasive ground for the distinction.

Other state courts, with, we think, better reason, have adopted a contrary view. In *State* v. *Baer,* 103 Ohio St. 585, a person charged with manslaughter had been convicted by eleven jurors. The trial began with a jury of twelve, but, one of the jurors becoming incapable of service, the trial was concluded with the remaining eleven. In disposing of the case, the state supreme court thought it necessary to consider the broad question (p. 589): ". . . whether the right of trial by jury, as guaranteed by Sections 5 and 10 of the Bill of Rights, can be waived." After an extensive review of the authorities and a discussion of the question on principle, the court concluded that since it was permissible for an accused person to plead guilty and thus waive *any* trial, he must necessarily be able to waive a *jury* trial.

In *Jennings* v. *State,* 134 Wis. 307, 309, where, again, a juror during the trial was excused from service because of illness, and the case was continued and concluded before the remaining eleven, the Supreme Court of Wisconsin also disposed of the case as involving the power of the defendant to waive a jury altogether, saying:

"It seems necessarily to follow that if a person on trial in a criminal case has no power to waive a jury he has no right to be tried by a less number than a common-law jury of twelve, and when he puts himself on the country it requires a jury of twelve to comply with the demands of the constitution. The fact that the jury in

the instant case had the required number of twelve up to the stage in the trial when the cause was to be submitted to them under the instructions of the court cannot operate to satisfy the constitutional demand. At this point the trial was incomplete, for the very essential duty of having the jury deliberate upon the evidence and agree upon a verdict respecting defendant's guilt or innocence remained unperformed. Without the verdict of a jury of twelve it cannot be said to be a verdict of the jury required by the constitution. Such a verdict is illegal and insufficient to support a judgment."

We deem it unnecessary to cite other cases which deal with the problem from the same point of view.

A constitutional jury means twelve men as though that number had been specifically named; and it follows that when reduced to eleven it ceases to be such a jury quite as effectively as though the number had been reduced to a single person. This conclusion seems self evident, and no attempt has been made to overthrow it save by what amounts to little more than a suggestion that by reducing the number of the jury to eleven or ten the infraction of the Constitution is slight, and the courts may be trusted to see that the process of reduction shall not be unduly extended. But the constitutional question cannot thus be settled by the simple process of ascertaining that the infraction assailed is unimportant when compared with similar but more serious infractions which might be conceived. To uphold the voluntary reduction of a jury from twelve to eleven upon the ground that the reduction—though it destroys the jury of the Constitution—is only a slight reduction, is not to interpret that instrument but to disregard it. It is not our province to measure the extent to which the Constitution has been contravened and ignore the violation, if in our opinion, it is not, relatively, as bad as it might have been.

We come, then, to the crucial inquiry: Is the effect of the constitutional provisions in respect of trial by jury to establish a tribunal as a part of the frame of government, or only to guaranty to the accused the right to such a trial? If the former, the question certified by the lower court must, without more, be answered in the negative.

Defendants strongly rely upon the language of this court in *Thompson* v. *Utah, supra,* at page 353:

"It is said that the accused did not object, until after verdict, to a trial jury composed of eight persons, and therefore he should not be heard to say that his trial by such a jury was in violation of his constitutional rights. It is sufficient to say that it was not in the power of one accused of felony, by consent expressly given or by his silence, to authorize a jury of only eight persons to pass upon the question of his guilt. The law in force, when this crime was committed, did not permit any tribunal to deprive him of his liberty, except one constituted of a court and a jury of twelve persons."

But this statement, though positive in form, is not authoritative. The case involved the validity of a statute dispensing with the common law jury of twelve and providing for trial by a jury of eight. There was no contention that the defendant, Thompson, had consented to the trial, but only that he had not objected until after verdict. The effect of an express consent on his part to a trial by a jury of eight was not involved—indeed he had been silent only under constraint of the statute—and what the court said in respect of that matter is, obviously, an *obiter dictum.*

Defendants also cite as supporting their contention two decisions of federal circuit courts of appeal, namely, *Low* v. *United States,* 169 Fed. 86; and *Dickinson* v. *United States,* 159 Fed. 801.

In the first of these cases the opinion, rendered by Judge Lurton, afterwards a justice of this court, definitely holds that the waiver of trial of a crime by jury involves setting aside the tribunal constituted by law for that purpose and the substitution by consent of one unknown to the law, and that this cannot be done by consent of the accused and the district attorney. "Undoubtedly," the opinion concludes, "the accused has a right to waive everything which pertains to form and much which is of the structure of a trial. But he may not waive that which concerns both himself and the public, nor any matter which involves fundamentally the jurisdiction of the court. The jurisdiction of the court to pronounce a judgment or conviction for crime, when there has been a plea of not guilty, rests upon the foundation of a verdict by a jury. Without that basis the judgment is void." This is strong language from a judge whose opinion is entitled to great respect.

In the second case, involving the completion of a trial by consent with a jury of eleven persons, substantially the same was held; but in a scholarly and thoughtful dissenting opinion, Judge Aldrich reviews the common law practice upon the subject antedating the Constitution, and in the course of his opinion, after referring to Article III, Section 2, and the Sixth Amendment, says (pp. 813–814, 820–821):

"The aim of the constitutional safeguards in question is a full, fair, and public trial, and one which shall reasonably and in all substantial ways safeguard the interests of the state and the life and liberty of accused parties. Whether the idea is expressed in words or not, as is done in some of the bills of rights and constitutions, a free and fair trial only means a trial as free and fair as the lot of humanity will admit.

"All will doubtless agree, at least the unquestioned authority is that way, that these protective provisions of

the Constitution are not so imperative that an accused shall be tried by jury when he desires to plead guilty; or that his trial, in the event of trial, shall be held invalid for want of due process of law, based upon the ground that he was not confronted with his witnesses when he had waived that constitutional right and consented to the use of depositions; or because he had not had compulsory process for obtaining witnesses in his favor when he had waived that; or because he had not had the assistance of counsel when he had intelligently refused such constitutional privilege and insisted upon the right to go to trial without counsel; or upon the ground that he had not had a speedy trial when he had petitioned the court for delay; or that his trial was not public when he had consented to, or silently acquiesced in, a trial in a courthouse with a capacity for holding only 12 members of the public rather than 1200.

"Beyond question, the right of an accused in a case like this to have 12 jurors throughout is so far absolute as a constitutional right that he may have it by claiming it, or even by withholding consent to proceed without that number, and doubtless, under a constitutional government like ours, the interests of the community so far enter into any incidental departure from that number, in the course of the trial, as to require the discretionary approval of the court, and that the proper representative of the government should join the accused in consent."

. . . . . .

"It is probable that the history and debates of the constitutional convention will not be found to sustain the idea that the constitutional safeguards in question were in any sense established as something necessary to protect the state or the community from the supposed danger that accused parties would waive away the interest which the government has in their liberties, and go to jail.

"There is not now, and never was, any practical danger of that. Such a theory, at least in its application to modern American conditions, is based more upon useless fiction than upon reason. And when the idea of giving countenance to the right of waiver, as something necessary to a reasonable protection of the rights and liberties of accused, and as something intended to be practical and useful in the administration of the rights of the parties, has been characterized as involving innovation 'highly dangerous,' it would, as said by Judge Seevers in State *v.* Kaufman, 51 Iowa, 578, 581, 2 N. W. 275, 277, 33 Am. Rep. 148, 'have been much more convincing and satisfactory if we had been informed why it would be highly dangerous.'"

. . . . . .

"Traced to its English origin, it would probably be found, so far as the right of waiver was there withheld from accused parties, that in a very large sense the reason for it was that conviction of crime, under the old English system, operated to outlaw and to attaint the blood and to work a forfeiture of official titles of inheritance, thus affecting the rights of third parties.

"In every substantial sense our constitutional provisions in respect to jury trials in criminal cases are for the protection of the interests of the accused, and as such they may, in a limited and guarded measure, be waived by the party sought to be benefited."

The record of English and colonial jurisprudence antedating the Constitution will be searched in vain for evidence that trial by jury in criminal cases was regarded as a part of the structure of government, as distinguished from a right or privilege of the accused. On the contrary, it uniformly was regarded as a valuable privilege bestowed upon the person accused of crime for the purpose of safeguarding him against the oppressive power of the King and the arbitrary or partial judgment of the

court. Thus Blackstone, who held trial by jury both in civil and criminal cases in such esteem that he called it "the glory of the English law," nevertheless looked upon it as a "privilege," albeit "the most transcendent privilege which any subject can enjoy." Book III, p. 379. And Judge Story, writing at a time when the adoption of the Constitution was still in the memory of men then living, speaking of trial by jury in criminal cases said:

"When our more immediate ancestors removed to America, they brought this great *privilege* with them, as their birthright and inheritance, as a part of that admirable common law which had fenced round and interposed barriers on every side against the approaches of arbitrary power. It is now incorporated into all our State constitutions as a fundamental *right,* and the Constitution of the United States would have been justly obnoxious to the most conclusive objection if it had not recognized and confirmed it in the most solemn terms." 2 Story on the Constitution, § 1779.

In the light of the foregoing it is reasonable to conclude that the framers of the Constitution simply were intent upon preserving the right of trial by jury primarily for the protection of the accused. If not, and their intention went beyond this and included the purpose of establishing the jury for the trial of crimes as an integral and inseparable part of the court, instead of one of its instrumentalities, it is strange that nothing to that effect appears in contemporaneous literature or in any of the debates or innumerable discussions of the time. This is all the more remarkable when we recall the minute scrutiny to which every provision of the proposed Constitution was subjected. The reasonable inference is that the concern of the framers of the Constitution was to make clear that the right of trial by jury should remain inviolable, to which end no language was deemed too imperative. That this was the purpose of the Third Article is rendered

highly probable by a consideration of the form of expression used in the Sixth Amendment.

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . ."

This provision, which deals with trial by jury clearly in terms of privilege, although occurring later than that in respect of jury trials contained in the original Constitution, is not to be regarded as modifying or altering the earlier provision; and there is no reason for thinking such was within its purpose. The first ten amendments and the original Constitution were substantially contemporaneous and should be construed *in pari materia.* So construed, the latter provision fairly may be regarded as reflecting the meaning of the former. In other words, the two provisions mean substantially the same thing; and this is the effect of the holding of this court in *Callan* v. *Wilson,* 127 U. S. 540, 549, where it is said:

"And we do not think that the amendment was intended to supplant that part of the third article which relates to trial by jury. There is no necessary conflict between them."

Upon this view of the constitutional provisions we conclude that Article III, Section 2, is not jurisdictional, but was meant to confer a right upon the accused which he may forego at his election. To deny his power to do so, is to convert a privilege into an imperative requirement.

But the question remains whether the court is empowered to try the case without a jury; that is to say, whether Congress has vested jurisdiction to that end. We think it has, although some of the state, as well as some of the federal, decisions suggest a different conclusion.

By the Constitution, Article III, Section 1, the judicial power of the United States is vested in the Supreme Court and such inferior courts as Congress may from time to

time ordain and establish. In pursuance of that authority, Congress, at an early day, established the district and circuit courts, and by § 24 of the Judicial Code (U. S. Code, Title 28, § 41 (2)), the circuit courts having been abolished, expressly conferred upon the district courts jurisdiction "of all crimes and offenses cognizable under the authority of the United States." This is a broad and comprehensive grant, and gives the courts named power to try every criminal case cognizable under the authority of the United States, subject to the controlling provisions of the Constitution. In the absence of a valid consent the district court cannot proceed except with a jury, not because a jury is necessary to its jurisdiction, but because the accused is entitled by the terms of the Constitution to that mode of trial. Since, however, the right to a jury trial may be waived, it would be unreasonable to leave the court powerless to give effect to the waiver and itself dispose of the case. We are of opinion that the court has authority in the exercise of a sound discretion to accept the waiver, and, as a necessary corollary, to proceed to the trial and determination of the case with a reduced number or without a jury; and that jurisdiction to that end is vested by the foregoing statutory provisions. The power of waiver being established, this is the clear import of the decision of this court in *Schick* v. *United States*, 195 U. S. 65, 70–71.

"By section 563, Rev. Stat., [superseded by § 24, Judicial Code] the District Courts are given jurisdiction 'of all crimes and offenses cognizable under the authority of the United States, committed within their respective districts, or upon the high seas, the punishment of which is not capital.' There is no act of Congress requiring that the trial of all offenses shall be by jury, *and a court is fully organized and competent for the transaction of business without the presence of a jury.*"

See also *In re Belt,* 159 U. S. 95, and *Riddle* v. *Dyche,* 262 U. S. 333, both of which are out of harmony with the notion that the presence of a jury is a constitutional prerequisite to the jurisdiction of the court in a criminal case. The first of these cases involved the validity of an act of Congress authorizing waiver of a jury in criminal cases in the District of Columbia. The Court of Appeals of that District upheld the statute in *Belt* v. *United States,* 4 D. C. App. Cas. 25. Leave was asked of this court to file a petition for writ of *habeas corpus.* Upon this application, the question to be answered was (p. 97):

"Does the ground of this application go to the jurisdiction or authority of the Supreme Court of the District, or rather is it not an allegation of mere error? If the latter, it cannot be reviewed in this proceeding. *In re Schneider,* 148 U. S. 162, and cases cited." After reviewing authorities, it was held that the Supreme Court of the District had jurisdiction to determine the validity of the act which authorized the waiver, and that its action could not be reviewed on *habeas corpus.*

In the second case, Riddle, on *habeas corpus,* assailed a conviction in a federal district court upon the ground that the jury was composed of only eleven men. This court held that the trial court had jurisdiction, and a record showing upon its face that a lawful jury had been impaneled, sworn and charged could not be collaterally impeached. The remedy was by writ of error.

This conclusion in respect of the jurisdiction of the courts, notwithstanding the peremptory words of the Third Article of the Constitution, is fortified by a consideration of certain provisions of the Judiciary Act of 1789. That act was passed shortly after the organization of the government under the Constitution, and on the day preceding the proposal of the first ten amendments by the first Congress. Among the members of that Congress were many who had participated in the

convention which framed the Constitution and the act has always been considered, in relation to that instrument, as a contemporaneous exposition of the highest authority. *Capital Traction Company* v. *Hof, supra,* pp. 9–10, and cases cited. Section 9 of that act provides that "the trial of issues in [of] fact, in the district courts, in all causes except civil causes of admiralty and maritime jurisdiction, *shall be by jury.*" Section 12 provides that "the trial of issues in [of] fact in the circuit courts *shall,* in all suits, except those of equity, and of admiralty, and maritime jurisdiction, *be by jury.*"

It will be observed that this language is mandatory in form, and is precisely the same as that of Article III, Section 2, of the Constitution. It is fair to assume that the framers of the statute, in using the words of the Constitution, intended they should have the same meaning; and if the purpose of the latter was jurisdictional, it is not easy to avoid the conclusion that the purpose of the former was the same. But this court has always held, beginning at an early day, that, notwithstanding the imperative language of the statute, it was competent for the parties to waive a trial by jury. The early cases are collected in a footnote to *Kearney* v. *Case,* 12 Wall. 275, 281, following the statement:

"Undoubtedly both the Judiciary Act and the amendment to the Constitution secured the *right* to either party in a suit at common law to a trial by jury, and we are also of opinion that the statute of 1789 intended to point out this as the mode of trial in issues of fact in such cases. Numerous decisions, however, had settled that this right to a jury trial might be waived by the parties, and that the judgment of the court in such cases should be valid."

The Seventh Amendment, which is here referred to, provides, in respect of suits at common law involving a value exceeding twenty dollars, that "the right of trial

by jury shall be preserved"; and it is significant that this language and the positive provision of the statute that "the trial of issues of fact . . . shall be by jury" were regarded as synonymous.

Another ground frequently relied upon for denying the power of a person accused of a serious crime to waive trial by jury is that such a proceeding is against public policy. The decisions are conflicting. The leading case in support of the proposition, and one which has influenced other decisions advancing similar views, is *Cancemi* v. *The People*, 18 N. Y. 128, 137–138. In that case Cancemi was indicted for the crime of murder. After a jury had been impaneled and sworn, and the trial begun, under a stipulation made by the prisoner and his counsel and counsel for the people, and with the express consent and request of the prisoner, a juror was withdrawn, and a verdict subsequently rendered by the remaining eleven jurors. On appeal a judgment based upon this verdict was reversed. The case was decided in 1858, and the question was regarded by the court as one of first impression. The following excerpt from the opinion indicates the basis of the decision:

"The state, the public, have an interest in the preservation of the liberties and the lives of the citizens, and will not allow them to be taken away 'without due process of law' (Const., art. 1, § 6), when forfeited, as they may be, as a punishment for crimes. Criminal prosecutions proceed on the assumption of such a forfeiture, which, to sustain them, must be ascertained and declared as the law has prescribed. Blackstone (vol. 4, 189) says: 'The king has an interest in the preservation of all his subjects.' . . . Objections to jurors may be waived; the court may be substituted for triers to dispose of challenges to jurors; secondary in place of primary evidence may be received; admissions of facts

are allowed; and in similar particulars, as well as in relation to mere formal proceedings generally, consent will render valid, what without it would be erroneous. A plea of guilty to any indictment, whatever may be the grade of the crime, will be received and acted upon if it is made clearly to appear that the nature and effect of it are understood by the accused. In such a case the preliminary investigation of a grand jury, with the admission of the accusation in the indictment, is supposed to be a sufficient safeguard to the public interests. But when issue is joined upon an indictment, the trial must be by the tribunal and in the mode which the constitution and laws provide, without any essential change. The public officer prosecuting for the people has no authority to consent to such a change, nor has the defendant.

"Applying the above reasoning to the present case, the conclusion necessarily follows, that the consent of the plaintiff in error to the withdrawal of one juror, and that the remaining eleven might render a verdict, could not lawfully be recognized by the court, at the circuit, and was a nullity. If a deficiency of one juror might be waived, there appears to be no good reason why a deficiency of eleven might not be; and it is difficult to say why, upon the same principle, the entire panel might not be dispensed with, and the trial committed to the court alone. It would be a highly dangerous innovation, in reference to criminal cases, upon the ancient and invaluable institution of trial by jury, and the constitution and laws establishing and securing that mode of trial, for the court to allow of any number short of a full panel of twelve jurors, and we think it ought not to be tolerated."

A decision flatly to the contrary, and one fairly representative of others to the same effect, is *State* v. *Kaufman,* 51 Iowa 578. The defendant there was indicted

for forgery. Upon the trial, one of the jurors, being ill, was discharged with the consent of the defendant, and the trial concluded with the remaining eleven. There was a verdict of guilty. Upon appeal the verdict was upheld. The authorities upon the question are reviewed, and in the course of the opinion the court says (pp. 579–580):

"A plea of guilty ordinarily dispenses with a jury trial, and it is thereby waived. This, it seems to us, effectually destroys the force of the thought that 'the State, the public, have an interest in the preservation of the lives and the liberties of the citizens, and will not allow them to be taken away without due process of law.' The same thought is otherwise expressed by Blackstone, vol. 4, p. 189, that 'the king has an interest in the preservation of all his subjects.'

"It matters not whether the defendant is, in fact, guilty; the plea of guilty is just as effectual as if such was the case. Reasons other than the fact that he is guilty may induce a defendant to so plead, and thereby the State may be deprived of the services of the citizen, and yet the State never actually interferes in such case, and the right of the defendant to so plead has never been doubted. He must be permitted to judge for himself in this respect. So in the case at bar. The defendant may have consented to be tried by eleven jurors, because his witnesses were then present, and he might not be able to get them again, or that it was best he should be tried by the jury as thus constituted. Why should he not be permitted to do so? Why hamper him in this respect? Why restrain his liberty or right to do as he believed to be for his interest? Whatever rule is adopted affects not only the defendant, but all others similarly situated, no matter how much they may desire to avail themselves of the right to do what the defendant desires to repudiate. We are unwilling to establish such a rule."

Referring to the statement in the *Cancemi* case, that it would be a highly dangerous innovation to allow any number short of a full panel of twelve jurors and one not to be tolerated, it is said (p. 581):

"This would have been much more convincing and satisfactory if we had been informed why it would be 'highly dangerous,' and should 'not be tolerated,' or, at least, something which had a tendency in that direction. For if it be true, as stated, it certainly would not be difficult to give a satisfactory reason in support of the strong language used."

See also *State* v. *Sackett*, 39 Minn. 69, where the court concludes its discussion of the subject by saying (p. 72):

"The wise and beneficent provisions found in the constitution and statutes, designed for the welfare and protection of the accused, may be waived, in matters of form and substance, when jurisdiction has been acquired, and within such limits as the trial court, exercising a sound discretion in behalf of those before it, may permit. The defendants, having formally waived a juror, and stipulated to try their case with 11, cannot now claim that there was a fatal irregularity in their trial."

It is difficult to see why the fact, frequently suggested, that the accused may plead guilty and thus dispense with a trial altogether, does not effectively disclose the fallacy of the public policy contention; for if the state may interpose the claim of public interest between the accused and his desire to waive a jury trial, *a fortiori* it should be able to interpose a like claim between him and his determination to avoid any form of trial by admitting his guilt. If he be free to decide the question for himself in the latter case, notwithstanding the interest of society in the preservation of his life and liberty, why should he be denied the power to do so in the former? It is no answer to say that by pleading guilty there is nothing left for a jury to try, for that simply ignores the question, which is not

what is the effect of the plea? the answer to which is fairly obvious, but, in view of the interest of the public in the life and liberty of the accused, can the plea be accepted and acted upon, or must the question of guilt be submitted to a jury at all events? Moreover, the suggestion is wholly beside the point, which is, that public policy is not so inconsistent as to permit the accused to dispense with *every* form of trial by a plea of guilty, and yet forbid him to dispense with a *particular* form of trial by consent.

The truth is that the theory of public policy embodies a doctrine of vague and variable quality, and, unless deducible in the given circumstances from constitutional or statutory provisions, should be accepted as the basis of a judicial determination, if at all, only with the utmost circumspection. The public policy of one generation may not, under changed conditions, be the public policy of another.

It may be conceded, at least generally, that under the rule of the common law the accused was not permitted to waive trial by jury, as generally he was not permitted to waive any right which was intended for his protection. Nevertheless, in the Colonies such a waiver and trial by the court without a jury was by no means unknown, as the many references contained in the brief of the Solicitor General conclusively show. But this phase of the matter we do not stop to consider, for the rule of the common law, whether exclusive or subject to exceptions, was justified by conditions which no longer exist; and as the Supreme Court of Nevada well said in *Reno Smelting Works* v. *Stevenson,* 20 Nev. 269, 279:

"It is contrary to the spirit of the common law itself to apply a rule founded on a particular reason to a law when that reason utterly fails—*cessante ratione legis, cessat ipsa lex.*"

The maxim seems strikingly apposite to the question here under review. Among other restraints at common law, the accused could not testify in his own behalf; in felonies he was not allowed counsel (IV Sharswood's Blackstone, 355, Note 14), the judge in such cases occupying the place of counsel for the prisoner, charged with the responsibility of seeing that the prisoner did not suffer from lack of other counsel (*id.*); and conviction of crime worked an attaint and forfeiture of official titles of inheritance, which, as Judge Aldrich points out (quotation *supra*), constituted in a large sense the reason for withholding from accused parties the right of waiver.

These conditions have ceased to exist, and with their disappearance justification for the old rule no longer rests upon a substantial basis. In this respect we fully agree with what was said by the Supreme Court of Wisconsin in *Hack* v. *State,* 141 Wis. 346, 351–352:

"The ancient doctrine that the accused could waive nothing was unquestionably founded upon the anxiety of the courts to see that no innocent man should be convicted. It arose in those days when the accused could not testify in his own behalf, was not furnished counsel, and was punished, if convicted, by the death penalty or some other grievous punishment out of all proportion to the gravity of his crime. Under such circumstances it was well, perhaps, that such a rule should exist, and well that every technical requirement should be insisted on, when the state demanded its meed of blood. Such a course raised up a sort of a barrier which the court could utilize when a prosecution was successful which ought not to have been successful, or when a man without money, without counsel, without ability to summon witnesses, and not permitted to tell his own story, had been unjustly convicted, but yet under the ordinary principles of waiver,

as applied to civil matters, had waived every defect in the proceedings.

"Thanks to the humane policy of the modern criminal law we have changed all these conditions. The man now charged with crime is furnished the most complete opportunity for making his defense. He may testify in his own behalf; if he be poor, he may have counsel furnished him by the state, and may have his witnesses summoned and paid for by the state; not infrequently he is thus furnished counsel more able than the attorney for the state. In short, the modern law has taken as great pains to surround the accused person with the means to effectively make his defense as the ancient law took pains to prevent that consummation. The reasons which in some sense justified the former attitude of the courts have therefore disappeared, save perhaps in capital cases, and the question is, Shall we adhere to the principle based upon conditions no longer existing? No sound reason occurs to us why a person accused of a lesser crime or misdemeanor, who comes into court with his attorney, fully advised of all his rights and furnished with every means of making his defense, should not be held to waive a right or privilege for which he does not ask, just as a party to a civil action waives such a right by not asking for it."

The view that power to waive a trial by jury in criminal cases should be denied on grounds of public policy must be rejected as unsound.

It is not denied that a jury trial may be waived in the case of petty offenses, but the contention is that the rule is otherwise in the case of crimes of the magnitude of the one here under consideration. There are decisions to that effect, and also decisions to the contrary. The conflict is marked and direct. *Schick* v. *United States, supra,* is thought to favor the contention. There the prosecution

was for a violation of the Oleomargarine Act (24 Stat. 209), punishable by fine only. By agreement in writing a jury was waived and the issue submitted to the court. Judgment was for the United States. This court held that the offense was a petty one, and sustained the waiver. It was said that the word "crimes" in Article III, Section 2, of the Constitution, should be read in the light of the common law, and so read, it does not include petty offenses; and that neither the constitutional provisions nor any rule of public policy prevented the defendant from waiving a jury trial. The question whether the power of waiver extended to serious offenses was not directly involved, and is not concluded by that decision. Mr. Justice Harlan, in a dissenting opinion, after reviewing the authorities, concluded (p. 83) that "The grounds upon which the decisions rest are, upon principle, applicable alike in cases of felonies and misdemeanors, although the consequences to the accused may be more evident as well as more serious in the former than in the latter cases."

Although we reject the general view of the dissenting opinion that a waiver of jury trial is not valid in any criminal case, we accept the foregoing statement as entirely sound. We are unable to find in the decisions any convincing ground for holding that a waiver is effective in misdemeanor cases but not effective in the case of felonies. In most of the decisions no real attempt is made to establish a distinction, beyond the assertion that public policy favors the power of waiver in the former but denies it in the latter because of the more serious consequences in the form of punishment which may ensue. But that suggested differentiation, in the light of what has now been said, seems to us more fanciful than real. The *Schick* case, it is true, dealt with a petty offense, but, in view of the conclusions we have already

reached and stated, the observations of the court (pp. 71–72) have become equally pertinent where a felony is involved:

"Article six of the amendments, as we have seen, gives the accused a right to a trial by jury. But the same article gives him the further right 'to be confronted with the witnesses against him . . . and to have the assistance of counsel.' Is it possible that an accused cannot admit and be bound by the admission that a witness not present would testify to certain facts? Can it be that if he does not wish the assistance of counsel and waives it, the trial is invalid? It seems only necessary to ask these questions to answer them. When there is no constitutional or statutory mandate, and no public policy prohibiting, an accused may waive any privilege which he is given the right to enjoy."

In *Commonwealth* v. *Beard,* 48 Pa. Super. Ct. 319, the prosecution was for conspiracy, and there, as here, one of the jurors was discharged and the trial concluded with the remaining eleven. Judgment on a verdict of conviction was sustained. The court, after reviewing the conflicting decisions, was unable to find any good reason for differentiating in the matter of waiver between the two classes of crimes. We fully endorse its concluding words upon that subject (pp. 323–324):

"It surely cannot be true that the public is interested in the protection of an accused in proportion to the magnitude of his offending—that its solicitude goes out to the great offender but not to the small—that there is a difference in point of sacredness between constitutional rights when asserted by one charged with a grave crime and when asserted by one charged with a lesser one. Hence, when it is held in Schick *v.* U. S., 195 U. S. 65 (24 Sup. Ct. Repr. 826), that in trials for the lowest grades of offenses the accused may waive, not only the continued presence of the full number of jurors re-

quired to make up a jury, but the right to trial by jury, the only possible conclusion is that the purely theoretical element of public concern, as potential to override the accused's own free choice and render him effectually unfree even before conviction and sentence, cannot be regarded as in reality much of a factor in any case."

This view of the matter subsequently had the approval of the supreme court of the state in *Commonwealth ex rel. Ross* v. *Egan*, 281 Pa. 251. After noting the conflict of authority, and that a waiver has been held to be effective in a number of states which are named, it is there said (pp. 255, 256, 257):

"A defendant is supposed to understand his rights, and may be aided, if he so desires, by counsel to advise him. There are many legal provisions for his security and benefit which he may dispense with absolutely, as, for instance, his right to plead guilty and submit to sentence without any trial whatsoever."

. . . . . .

"The theory upon which the opposing cases are decided seems to rest on the proposition that society at large is as much interested in an impartial trial of a defendant, who may be sentenced to imprisonment, as he himself is, and therefore no permission to waive any right, when charged with a felony, should be accorded to him. There may be reason for applying this rule to capital cases, as has been done in Pennsylvania, but such a principle ought not to be invoked to relieve those charged with lesser offenses, such as larceny (though technically denominated a felony), from the consequences of their own voluntary act, and where it appears by the record that consent to the course pursued was freely given, the defendant should not be heard thereafter to complain."

. . . . . .

"The solution of the question depends upon the determination whether a trial by less than twelve is an irregularity or a nullity. If the latter be held, no sentence imposed may be sustained, but the contrary is true if the former and correct conclusion be reached. In the case of misdemeanors, the Superior Court has sustained the sentences where a voluntary waiver appeared: Com. *v.* Beard, supra. No real justification for a different decision in the case of felonies, not capital, can be supported."

See also *Commonwealth* v. *Rowe,* 257 Mass. 172, 174–176; *State* v. *Ross,* 47 S. D. 188, 192–193, involving a misdemeanor, but followed in *State* v. *Tiedeman,* 49 S. D. 356, 360, involving a felony.

In affirming the power of the defendant in any criminal case to waive a trial by a constitutional jury and submit to trial by a jury of less than twelve persons, or by the court, we do not mean to hold that the waiver must be put into effect at all events. That perhaps sufficiently appears already. Trial by jury is the normal and, with occasional exceptions, the preferable mode of disposing of issues of fact in criminal cases above the grade of petty offenses. In such cases the value and appropriateness of jury trial have been established by long experience, and are not now to be denied. Not only must the right of the accused to a trial by a constitutional jury be jealously preserved, but the maintenance of the jury as a fact finding body in criminal cases is of such importance and has such a place in our traditions, that, before any waiver can become effective, the consent of government counsel and the sanction of the court must be had, in addition to the express and intelligent consent of the defendant. And the duty of the trial court in that regard is not to be discharged as a mere matter of rote, but with sound and advised discretion, with an eye to avoid unreasonable or undue departures from that mode of

trial or from any of the essential elements thereof, and with a caution increasing in degree as the offenses dealt with increase in gravity.

The question submitted must be answered in the affirmative.

It is so ordered.

The CHIEF JUSTICE took no part in the consideration or decision of this case.

MR. JUSTICE SANFORD participated in the consideration and agreed to a disposition of the case in accordance with this opinion.

MR. JUSTICE HOLMES, MR. JUSTICE BRANDEIS, and MR. JUSTICE STONE concur in the result.

MISSOURI EX REL. MISSOURI INSURANCE COMPANY v. GEHNER, ASSESSOR OF THE CITY OF ST. LOUIS, ET AL.

APPEAL FROM THE SUPREME COURT OF MISSOURI.

No. 222. Argued February 26, 1930.—Decided April 14, 1930.

1. A judgment of a state supreme court so construing a state statute as to cause it to infringe federal rights is reviewable in this Court even though the federal question was first presented to the state court by a petition for rehearing which was denied without referring to the federal question, if the construction was one that the party affected could not have anticipated and the federal question was presented by him at the first opportunity. P. 320.
2. Property taxable by a State may not be taxed more heavily because the owner owns also tax-exempt bonds of the United States. P. 320.
3. A state statute providing generally that, in taxing the assets of insurance companies, the amounts of their legal reserves and unpaid policy claims shall first be deducted, is unconstitutional in its application to an insurance company owning nontaxable United States bonds if it require that the deduction, in such case, shall be reduced by the proportion that the value of such bonds bears to total assets,

thus inflicting upon the company a heavier tax burden than it would have borne had it not owned the bonds. P. 321.

322 Mo. 339, reversed.

APPEAL from a judgment of the Supreme Court of Missouri sustaining on certiorari a property tax assessed against the relator Insurance Company by the City Board of Equalization.

Mr. Ralph T. Finley, with whom *Messrs. James C. Jones, Lon O. Hocker, Frank H. Sullivan,* and *James C. Jones, Jr.,* were on the brief, for appellant.

The judgment contravenes § 8 of Art. I of the Federal Constitution because it inevitably results in denying the exemption of the bonds. *Farmers Bank* v. *Minnesota,* 232 U. S. 516; *Northwestern Mut. Life Ins. Co.* v. *Wisconsin,* 275 U. S. 136; *Miller* v. *Milwaukee,* 272 U. S. 713; *National Life Ins. Co.* v. *United States,* 277 U. S. 508; *Waco* v. *Amicable Life Ins. Co.,* 230 S. W. 698, 248 S. W. 332.

One of the necessary results of the method of calculating the net taxable assets is in effect to tax a portion of the deductible legal reserve. It subjected the relator's property to greater burdens because it owned some that was free from taxation. This, indirectly at least, deprived the relator of its exemption.

Under the plain terms of § 6383 and the decisions of the court below, the reserves are deductible from the gross taxable assets. *State* v. *Buder,* 315 Mo. 798; *State* v. *Schramm,* 271 Mo. 227.

The Supreme Court of Missouri has repeatedly held that the entire legal reserve is deductible, and that domestic insurance companies having no tax-exempt securities may deduct their entire reserve. *Central States L. Ins. Co.* v. *Gehner,* 8 S. W. (2d) 1073; *Id.,* 1068; *Indemnity Co.* v. *Gehner,* 8 S. W. (2d) 1067. Consequently § 6386 is made to contravene the due process and equal

protection clauses of the Fourteenth Amendment. *Sunday Lake Iron Co.* v. *Wakefield,* 247 U. S. 352; *Southern Ry. Co.* v. *Green,* 216 U. S. 412; *Quaker City Cab Co.* v. *Pennsylvania,* 277 U. S. 402; *Miller* v. *Milwaukee,* 272 U. S. 714.

Mr. Oliver Senti, First Associate City Counselor of St. Louis, with whom *Messrs. Julius T. Muench,* City Counselor, *Stratton Shartel,* Attorney General of Missouri, and *Lieutellus Cunningham,* Assistant Attorney General, were on the brief, for appellees.

The statute prescribes a system of taxation of net assets, which shall be assessed like the property of individuals. *State* v. *Schramm,* 271 Mo. 223.

Whether that part of the reserve and unpaid policy claims which consists of taxable property is deducted from the Company's total taxable property and the assessment is imposed on the remainder, or whether the taxable property is apportioned between the reserve and unpaid policy claims (liabilities) and the net assets, and the assessment is imposed on that part of the net assets which consists of taxable property, is mere calculation; the result is the same.

An appellate court reviews the judgment, not the opinion below. *M'Clung* v. *Silliman,* 6 Wheat. 598.

It is not claimed that § 6386 as construed imposes a tax directly on government bonds. The contention is that an insurance company which is taxed on its net assets is denied exemption from taxation on government bonds when the taxing authorities treat such bonds as being invested in part in the net assets and in part in the legal reserve and unpaid policy claims.

Distinguishing: *Farmers Bank* v. *Minnesota,* 232 U. S. 516; *Northwestern Mut. Life Ins. Co.* v. *Wisconsin,* 275 U. S. 136; *Miller* v. *Milwaukee,* 272 U. S. 713; *National Life Ins. Co.* v. *United States,* 277 U. S. 508; *Waco* v.

Amicable Life Ins. Co., 230 S. W. 698; 248 S. W. 332; *State* v. *Buder*, 315 Mo. 798; *State* v. *Schramm*, 271 Mo. 227; *Central States Life Ins. Co.* v. *Gehner*, 8 S. W. (2d) 1073; *Id.*, 1068; *Indemnity Co.* v. *Gehner*, 8 S. W. (2d) 1067; *Sunday Lake Iron Co.* v. *Wakefield*, 247 U. S. 352; *Southern Ry. Co.* v. *Green*, 216 U. S. 412; *Quaker City Cab Co.* v. *Pennsylvania*, 277 U. S. 402.

The statute as construed does no more than to authorize the taxation of that part of the net assets which may fairly be said to consist of taxable property. *State* v. *Buder*, 315 Mo. 791. It does not tax the appellant's reserve.

The appellant's right to have the amount of the assessment on its personal property determined in the manner prescribed by § 6383, rests on that statute, or it does not exist. The statute means what the highest court of the State has construed it to mean, or, in contemplation of law, it does not exist, and personal property to the value of over $350,000.00 owned by appellant is subject to taxation under § 12766, R. S. Mo., 1919.

When a state statute results in the imposition of a smaller assessment on the personal property owned by appellant than would be imposed upon the same property if owned by a person or corporation to whom the state statute does not apply, there can be no invasion of appellant's rights under the Fourteenth Amendment.

Practically all of the States treat the legal reserve of an insurance company as a fund held for the protection and security of the policyholders, and have adopted laws designed to keep it intact. In Missouri the highest court has construed this statute to mean that in determining what part of appellant's assets is reserve set aside for the security of its policyholders, and what part is net assets belonging to appellant and held for its own profit, the Assessor can make a division of the non-taxable property between those two funds. The appellant has no

right under the Constitution or laws of the United States to allocate all of its non-taxable property to its net assets, and the Missouri Supreme Court has held that it has no such right under the statute. The question, it would appear, is one of state law, in which the decision of the state court ought to be final. For this Court to hold that the Assessor cannot apportion the appellant's taxable and non-taxable property to its reserve and to its net assets, would increase the extent to which the State has granted appellant immunity from taxation, and would, in effect at least, amend a statute of the State.

It would seem that, whether the claim is made that the result of a statute is to impose a tax upon securities of the United States, or to impose a burden upon interstate commerce, the rule ought to be the same; that is to say, that the validity of the tax depends upon the effect and operation of the statute, and that if the tax imposed pursuant thereto is no greater than the tax ordinarily imposed upon property generally within the State, it is not open to attack as in conflict with the equal protection clause or due process clause of the Constitution.

MR. JUSTICE BUTLER delivered the opinion of the Court.

Appellant is an insurance company organized under the laws of Missouri. It maintains that as construed in this case § 6386, Revised Statutes of Missouri, 1919, is repugnant to the Constitution and laws of the United States.

Section 6386 provides.

"The property of all insurance companies organized under the laws of this state shall be subject to taxation for state, county, municipal and school purposes, as provided in the general revenue laws of this state in regard to taxation and assessment of insurance companies.

Every such company or association shall make returns, subject to the provisions of said laws: First, of all the real estate held or controlled by it; second, of the net value of all its other assets or values, in excess of the legally required reserve necessary to reinsure its outstanding risks and of any unpaid policy claims, which net values shall be assessed and taxed as the property of individuals . . ."

The company made a return in pursuance of that section. The total value of its personal property was $448,265.33 including $94,000 in United States bonds. The legal reserve and unpaid policy claims amounted to $333,486.69. It deducted such bonds, reserve and claims leaving $20,778.64 as the net value to be taxed.[1]

The board of equalization declined to accept the return and after hearing the parties held that the bonds of the United States are not taxable, that § 6386 contravenes provisions of the state constitution requiring uniform taxation, and that therefore the company was not entitled to deduct the amount of such reserve and claims.

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[1] The substance of the return follows:

Real Estate, Improvement, etc.		$142,000.00
Bonds, Municipal		289,000.00
Bonds, Government		94,000.00
Bonds, Mortgages		60,000.00
Cash		5,265.33
Total Assets		$590,265.33
Less Real Estate assessed as above and on which the Company pays taxes	$142,000.00	
Less reserve required by law	326,522.69	
Less U. S. Government Bonds	94,000.00	
Less Unpaid Policy Claims	6,964.00	
		$569,486.69
		$20,778.64

The board assessed the company's taxable property at $50,000 without disclosing how it arrived at the amount.

On the company's application, the state supreme court issued its writ of certiorari to bring up for review the record and action of the board. The court held the section valid, found the company's liabilities were chargeable against all its assets—taxable and nontaxable alike—declared that such reserve and claims should be apportioned between the two classes of assets according to their respective amounts and determined that approximately 79.03 per cent. of such liabilities should be deducted from the value of the taxable personal property leaving $90,710.80 as the net value to be taxed.[2] And as that exceeded the amount fixed by the board, the court refused to disturb the assessment, and entered judgment quashing the writ.

The company made a motion for rehearing on the ground, among others, that § 6386 as construed violated the clause of § 8, Art. I, of the Constitution which gives to Congress the power to borrow money on the credit of the United States and also § 3701, Revised Statutes (31 U. S. C., § 742) which provides that all bonds of the United States shall be exempt from taxation by or under state, municipal or local authority. The court overruled the motion and modified its opinion. The modified opinion was the same as the earlier one except as to details of calculation. It found $74,136.52 to be the tax-

[2] The calculation in the first opinion was in substance as follows:

The court divided total taxable assets $354,265.33 ($349,000 bonds and $5,265.33 cash) by total personal assets $448,265.33 ($349,000 bonds, $5,265.33 cash and $94,000 United States bonds). The result was .7903. Total liabilities, $333,486.69 ($326,522.69 reserve and $6,964.00, unpaid policy claims) was multiplied by .7903. The result was $263,554.53. This was subtracted from $354,265.33, and the difference was $90,710.80.

able net value.[3] The court did not refer to the federal questions raised by the motion for rehearing.

1. It is well settled that this court will not consider questions that were not properly presented for decision in the highest court of the State. Ordinarily it will not consider contentions first made in a petition to the state court for rehearing where the petition is denied without more. *Citizens National Bank* v. *Durr*, 257 U. S. 99, 106. But here the company, at the first opportunity, invoked the protection of the federal Constitution and statute. It could not earlier have assailed the section as violative of the Constitution and laws of the United States. The board of equalization completely eliminated the bonds from its calculations, and there is nothing in the language of the section to suggest that it authorizes any diminution of the amount of the deductible reserve and unpaid claims or an apportionment of such liabilities between taxable and nontaxable assets. It may not reasonably be held that the company was bound to anticipate such a construction or in advance to invoke federal protection against the taxation of its United States bonds. Upon the facts disclosed by this record it is clear that appellant sufficiently raised in the highest court of the State the federal questions here presented and is entitled to have them considered. *Saunders* v. *Shaw*, 244 U. S. 317, 320. *Ohio ex rel. Bryant* v. *Akron Park District*, *ante*, p. 74.

2. It is elementary that the bonds or other securities of the United States may not be taxed by state authority.

[3] The court divided total taxable assets $496,265.33 ($349,000 bonds, $5,265.33 cash, and $142,000 real estate) by total assets $590,265.33 ($349,000 bonds, $5,265.33 cash, $94,000 United States bonds and $142,000 real estate). The result was .84. Total liabilities $333,486.69 was multiplied by .84. The result was $280,128.81. This was subtracted from $354,265.33, taxable personal assets, and the difference was $74,136.52.

That immunity always has been deemed an attribute of national supremacy and essential to its maintenance. The power of Congress to borrow money on the credit of the United States would be burdened and might be destroyed by state taxation of the means employed for that purpose. As the tax-exempt feature tends to increase and is reflected in the market prices of such securities, a state tax burden thereon would adversely affect the terms upon which money may be borrowed to execute the purposes of the general government. It necessarily follows from the immunity created by federal authority that a State may not subject one to a greater burden upon his taxable property merely because he owns tax-exempt government securities. Neither ingenuity in calculation nor form of words in state enactments can deprive the owner of the tax exemption established for the benefit of the United States. *Nat'l. Life Ins. Co.* v. *United States,* 277 U. S. 508, 519, and cases cited. *M'Culloch* v. *Maryland,* 4 Wheat. 316, 431, 432, 436.

After deducting government bonds (exempt), real estate (otherwise taxed), legal reserve and unpaid policy claims from total assets, there remained the amount returned by appellant, $20,778.64. The court held the section to require the reserve and unpaid claims to be reduced by the proportion that the value of the United States bonds bears to total assets. It found $74,136.52 to be appellant's taxable net value. And so it used the value of the bonds, $94,000, to increase the taxable amount by $53,357.88.

The section discloses a purpose as a general rule to omit from taxation sufficient assets of the insurance companies to cover their legal reserve and unpaid policy claims. It would be competent for the State to permit a less reduction or none at all. But where as in this case the ownership of United States bonds is made the basis of denying the full exemption which is accorded to those

who own no such bonds this amounts to an infringement of the guaranteed freedom from taxation. It is clear that the value of appellant's government bonds was not disregarded in making up the estimate of taxable net values. That is in violation of the established rule. *Nat'l. Life Ins. Co.* v. *United States, supra. Northwestern Ins. Co.* v. *Wisconsin,* 275 U. S. 136. *Miller* v. *Milwaukee,* 272 U. S. 713.

Judgment reversed.

The CHIEF JUSTICE concurs on the ground that this case is governed by *National Life Ins. Co.* v. *United States,* 277 U. S. 508.

MR. JUSTICE STONE.

To state the problem now presented in its simplest concrete form, if an insurance company has policy liabilities of $100,000, $100,000 of taxable personal property, and $100,000 of government bonds, its net assets would be $100,000. Under the statute of Missouri taxing net assets, as applied by the state court, one-half of this net worth or $50,000 would be subject to the tax since one-half of its entire property consists of taxable assets and so contributes one-half of the net. Under the decision of this Court, the company would go tax free, on the theory that the Constitution requires that in ascertaining the taxable net worth, tax exempt bonds must be excluded from the computation as though they were not liable for the debts of the taxpayer.

That conclusion appears to me to open a new and hitherto unsuspected field of operation for the immunity from taxation enjoyed by national and state securities as instrumentalities of government, and to accord to their owners a privilege which is not justified by anything that has been decided or said by this Court.

Since *Weston* v. *Charleston,* 2 Pet. 449, this Court, by a long line of decisions, has so restricted the immunity as to relieve only from the burden of taxation imposed on such securities or their income. The immunity has not been supposed to confer other special benefits on their owners. In every case it has been consistently applied so as to leave reasonable scope for the exercise by both national and state governments of the constitutional power to tax. *Railroad* v. *Penniston,* 18 Wall. 5; *Plummer* v. *Coler,* 178 U. S. 115; *South Carolina* v. *United States,* 199 U. S. 437, 461; *Flint* v. *Stone-Tracy Co.,* 220 U. S. 107, 162–165; *Greiner* v. *Lewellyn,* 258 U. S. 384; *Blodgett* v. *Silberman,* 277 U. S. 1, 12; see *Metcalf & Eddy* v. *Mitchell,* 269 U. S. 514, 523, 524.

The present tax differs from those which have previously been considered by the Court in this connection, in that it is not imposed on any specific identifiable property or its income. It is a tax on net worth, the value of the taxpayer's property after providing for the policy liabilities. Net worth is the result of a mathematical computation, into which of necessity enter all his assets subject to liabilities and all such obligations of the taxpayer as the statute permits to be deducted. It is the result of the computation which is the subject of the tax, and it is the subject of the tax to which exemptions are to be applied.

The immunity of government bonds from taxation does not carry with it immunity from liability for debts. *Scottish Insurance Co.* v. *Bowland,* 196 U. S. 611, 632. Hence, whether the measure of the tax be technically described as taxable net worth or as taxable assets less an allowed deduction representing liabilities to which they are subject, the state, in fixing the tax, does not infringe any constitutional immunity by requiring liabilities to be deducted from all the assets, including tax exempt bonds,

or, what comes to the same thing, by deducting from taxable assets their proportionate share of the burden of policy liabilities.

To say that debts must be deducted from taxable assets alone; that no part of the net worth of the taxpayer who owns tax-free securities may be taxed if his debts equal his tax-free assets, is equivalent to saying, in such a situation, either that the taxable assets constitute no part of the net worth or that, even though they are a part, still that part is not taxable. But it is not to be supposed that a mathematician, an accountant or a business man would regard the taxable assets as contributing nothing to surplus, or, where one-half of the taxpayer's property is tax-free, that there is any basis for saying that net worth could, on any theory, be attributed more to one class of assets than the other. Yet the result now reached would seem to presuppose that the tax-exempt securities alone had contributed to the taxpayer's net worth. These incongruous consequences of the rule applied seem to be attributable to the only assumption on which the rule itself could proceed, that government bonds, because they are tax-exempt, are also debt-exempt, or may not be used for the payment of debts, when in fact and in law tax-exempt securities constitute a part of the corporate reservoir of capital, all of which without distinction may be drawn on for the payment of obligations.

If Missouri, as it undoubtedly might, had levied a tax on all the property of appellant except its tax exempt bonds, without any deduction for its policy reserve, it is difficult to see upon what articulate principle the tax would be rendered invalid by permitting the taxpayer to deduct from the value of its assets, the same proportion of all its reserves which the taxable assets bear to the total property, all of which is liable for its policies. It would certainly not be because the ownership of the bonds was discriminated against in the apportionment of

the deduction, or burdened by the tax. Or if, one-half of the gross assets of a taxpayer being chattels without the state, it had taxed his property within the state allowing as a deduction one-half his indebtedness, I do not suppose it would have occurred to anyone to say that the levy was invalid as a tax upon the property beyond the taxing jurisdiction. Yet neither of these taxes differs from the present in its effect on the ownership of either taxable or tax-free property.

The apportionment of net worth according to the amounts of the constituent elements which enter into its computation has long been a familiar method of accountants and has repeatedly been incorporated in taxing statutes where, for one reason or other, it is desirable or necessary not to impose a tax on some of these elements. The fairness and accuracy of that method has not hitherto been questioned.

In *National Leather Company* v. *Massachusetts,* 277 U. S. 413, the state levied a tax upon "such proportion of the fair cash value of all the shares constituting the capital stock . . . as the value of the assets . . . employed . . . within the Commonwealth . . . bears to the total assets of the corporation." The fair cash value of all the shares was, like net worth, the result of subtracting all the obligations of the company from its gross assets. See *National Bank of Wellington* v. *Chapman,* 173 U. S. 205, 215; cf. *State Railroad Tax Cases,* 92 U. S. 575. The proportion of the net worth which was taxable because attributable to Massachusetts was computed after the deduction was made. If the theory of tax immunity here sustained had been followed, all the debts of the company would have been deducted from that part of the gross assets attributable to the state, since a taxpayer whose gross assets were all taxable would have had that privilege. While the methods of computing the taxable portion of net worth vary, the principle that

"deductions for obligations" are to be apportioned among taxables and non-taxables is supported in *Underwood Typewriter Company* v. *Chamberlain,* 254 U. S. 113; *Bass, Ratcliff &c., Ltd.* v. *Tax Commission,* 266 U. S. 271; *Shaffer* v. *Carter,* 252 U. S. 37, 56, 57; and *U. S. Glue Company* v. *Oak Creek,* 247 U. S. 321, 324, 325.[1]

It is said that the present tax must be held invalid because, as a matter of law, exemptions may not be reduced, nor may tax burdens be increased in consequence of the ownership of tax-free securities, and that in the present case their ownership was in fact used to

[1] The difference between the two methods may be illustrated by supposing a corporation with gross assets of $15,000,000 and obligations of $5,000,000. The fair cash value of all the shares would then be $10,000,000. Assume that one-tenth of its property is in Massachusetts. The assessment would be $1,000,000 under the *Leather Company* case. By the present method $5,000,000 would be deducted from one-tenth of the gross assets, $1,500,000, because a concern owning no exempt property might make that deduction. Under the present case the company would be free from tax.

In *Shaffer* v. *Carter,* Oklahoma levied a net income tax; in the case of residents, upon income derived from all sources; in the case of non-residents, upon locally derived income. Residents were permitted to deduct all losses, non-residents were permitted deductions only for local losses. The Court said (p. 57):

"The difference, however, is only such as arises naturally from the extent of the jurisdiction of the state in the two classes of cases, and cannot be regarded as an unfriendly or unreasonable discrimination. As to residents it may, and does, exert its taxing power over their income from all sources, whether within or without the State, and it accords to them a corresponding privilege of deducting their losses, wherever these accrue. As to non-residents, the jurisdiction extends only to their property owned within the State and their business, trade or profession carried on therein, and the tax is only on such income as is derived from those sources. Hence there is no obligation to accord to them a deduction by reason of losses elsewhere incurred."

There seems to be as colorable reason in that case as in this for asserting that the receipt of exempt income is made the basis for a reduction or elimination of an exemption granted to others.

increase taxable values. Neither proposition can, I think, be supported. First, it is not universally true that ownership of tax exempt securities may not increase the burden of a tax. Taxes upon transfer at death, state or federal, may be increased by the ownership by deceased of tax exempt securities. *Plummer* v. *Coler, supra; Knowlton* v. *Moore,* 178 U. S. 41; *Greiner* v. *Lewellyn, supra; Blodgett* v. *Silberman, supra.* Notwithstanding *Macallen* v. *Massachusetts,* 279 U. S. 620, I do not understand that tax exempt securities of a corporation, or the income from them, may under no circumstances enter into the computation of a corporate franchise tax and increase it proportionately, or that a broker or dealer in securities may not be taxed on his profits from the purchase and sale of government and state securities. Compare *Peck & Co.* v. *Lowe,* 247 U. S. 165; *Barclay & Co.* v. *Edwards,* 267 U. S. 442. In *National Leather Company* v. *Massachusetts, supra,* an increase of property outside the taxing state might increase the tax on net assets within the state. For like reasons it would seem that the tax-free securities might rightly enter into the computation of net worth since they are liable for debts and so contribute to net worth, and that the net worth thus computed should be held subject to the state tax except insofar as tax exempt securities contribute to it.

Second, in the present case, it is difficult to see in what respect the mere ownership of the appellant's tax-free securities has been resorted to in order to increase taxable net values. That conclusion does not follow from the fact that the state court in its second opinion found a larger taxable value upon a different interpretation of the statute than in its first. It could be true only if, by the consistent application of the rule finally laid down, the shifting of some of the taxpayer's investments from taxable to exempt securities would result in an increase of

the tax. But such is not the effect of the statute, for if the taxpayer who owns no exempt property may be taxed on his full net worth, but is taxed only half as much if he converts one-half of his gross assets into tax exempt bonds, it would seem that ownership of the latter had resulted in a decrease and not an increase of taxable values and that the burden of the tax is diminished with mathematical exactness in the proportion that the taxpayer has chosen to invest in tax exempt securities.

Invoking the rule now laid down, a taxpayer having no tax exempt securities and legitimately bearing the burden of a state tax on net worth may put off the burden completely by the simple expedient of purchasing, on credit, government bonds equal in value to his net taxable assets. The success of a device so transparently destructive of the taxing power of the state may well raise doubts of the correctness of the constitutional principle supposed to sustain it. So construed, the Constitution does more than protect the ownership of government bonds from the burdens of taxation. It confers upon that ownership an affirmative benefit at the expense of the taxing power of the state, by relieving the owner from the full burden of taxation on net worth to which his taxable assets have in some measure contributed.

But it is no less our duty to recognize and protect the powers reserved to the state under the Constitution than the immunities granted to the federal government. *South Carolina* v. *United States, supra.* The right of the state to tax net worth, so far as it is attributable to taxable assets, and that of the national government to insist upon its exemption so far as tax-free property enters into its computation, stand on an equal footing. There is nothing in the Constitution nor in the decisions of this Court to justify a taxpayer in demanding that the one should be sacrificed to the other, or which would

support the national government in saying to the state that in ascertaining taxable net worth debts must be deducted from taxable assets alone, any more than it would support the state in insisting that debts should be deducted exclusively from the taxpayer's government bonds in ascertaining taxable net worth.

Nothing said by this Court in *National Life Insurance Co.* v. *United States*, 277 U. S. 508, decided one week later than the *National Leather Company* case, *supra*, should lead to a reversal of the judgment below. In that case an Act of Congress taxing the income of insurance companies granted an exemption of 4% of their reserve. By the terms of the statute the benefit of the exemption was withheld to the extent that the taxpayer received income from tax exempt securities. The statute regulated only the exercise of the power of the national government to tax. Neither it nor the decision of the court affected the taxing power of a state. The statute was assailed solely on the ground that it discriminated against the holder of tax exempt securities merely because they were tax-exempt, to the extent that the statutory exemption was withheld from the holder of government, state and municipal bonds. The effect of this discrimination was that if the taxpayer shifted investments from its taxable to its tax exempt list its tax remained undiminished until the income from the tax-free list equalled the statutory exemption.

After pointing out that the collector in applying the statute had diminished the statutory exemption by the amount of interest received from tax exempt securities, the court said, p. 519: "Thus he [the tax collector] required petitioner to pay more upon its taxable income than could have been demanded had this been derived solely from taxable securities. If permitted, this would destroy the guaranteed exemption. One may not be

subjected to greater burdens upon his taxable property solely because he owns some that is free."

But the present statute has no such effect. Calling the deduction of policy liabilities, required for the computation of the tax, an "exemption" and saying that ownership of tax exempt securities is made the basis of denying the "full exemption," may give this case a verbal resemblance to that, but it does no more. True, a change by appellant from taxable to tax free investments would result in a smaller deduction from its taxable assets, but it would also result in a proportionate reduction of its taxable assets with a corresponding decrease in taxable values, always in exact proportion to appellant's investment in tax exempt securities.

Only if the taxpayer were the fortunate recipient of a gift of tax exempt securities could the net worth of its taxable securities be increased and this not solely or at all because its newly acquired securities are "free," but because they, like its taxable assets, may be used to meet policy obligations, and thus proportionately relieve taxable assets from that burden. Similarly, a gift by way of payment of policy obligations or reinsurance would increase the tax although it would not increase taxable assets. So the increase, by gift, of property outside the state would increase the tax upon net assets within the state. The property outside the state is not subject to a tax, but it must pay its share of the debts. But in every case, as in the present, the tax assessed would correspond with mathematical exactness to the contributions made by the taxable assets to the total net worth. Hence, the question here is not whether the taxpayer has been discriminated against because he owns government bonds, but only whether the privilege which the state recognizes as attaching to their ownership is sufficiently great.

If the constitutional inhibition is not directed against the imposition of burdens, but affirmatively compels the

annexation of such benefits to the ownership of government bonds as will increase their currency and stimulate the market for them, even though those privileges are extended at the expense of the constitutional powers of the states, it is difficult to see what the limits of such a doctrine may be. I suppose that the sale and market value of government bonds would be materially increased if we were to say that the Constitution *sub silentio* had forbidden their seizure for debts, or rendered their possessor immune from the various forms of state taxation to which this Court has said he is subject. But however desirable such a consequence might be thought to be, that could hardly be taken as a sufficient ground for saying it.

I think the judgment should be affirmed.

MR. JUSTICE HOLMES and MR. JUSTICE BRANDEIS concur in this opinion.

NATIONAL FIRE INSURANCE COMPANY OF HARTFORD *v.* THOMPSON, SUPERINTENDENT OF THE INSURANCE DEPARTMENT OF MISSOURI, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.

No. 104. Argued January 16, 1930.—Decided April 14, 1930.

1. Under a stipulation made by fire insurance companies in Missouri with the State Superintendent of Insurance, in a suit attacking a rate fixed by him (Mo. Rev. Stats., § 6283) that suit was dismissed, a new hearing was had by the Superintendent and a new rate promulgated, which was reviewed in a new proceeding in the state courts (involving no federal question, *Aetna Ins. Co. v. Hyde*, 275 U. S. 440) and finally sustained by the Supreme Court of the State. Although the statute provided (§ 6284) that upon such review rates in excess of those fixed by the Superin-

tendent should not be charged, the companies in this instance, in virtue of the stipulation, collected their old rates, pending the review, by giving a bond to refund excess collections to the assured. Plaintiff, a party to the stipulation, sued in the United States court to enjoin the enforcement of the order on the ground that § 6283 and the order were repugnant to the due process and equal protection clauses of the Fourteenth Amendment. The lower court found the stipulation valid and denied plaintiff's application because it had not repaid the excess charges, but without prejudice to renewal after such payment.

Held that the stipulation, pursuant to which the higher rates were collected, amounted to a promise to return the excess if the reduction should be finally sustained, and it cannot be said that the lower court erred in withholding relief until plaintiff makes good its promise to refund. P. 335.

2. Courts of equity frequently decline to interfere on behalf of a complainant whose attitude is unconscientious in respect of the matter concerning which it seeks relief. *Deweese* v. *Reinhard*, 165 U. S. 386, 390. P. 338.

3. Judicial notice taken of a matter in the record of another case. P. 336.

4. A decree of the District Court denying an interlocutory injunction will not be reversed unless shown to be contrary to some rule of equity or the result of an improvident exercise of judicial discretion. P. 338.

34 F. (2d) 185, affirmed.

APPEAL from a decree of the District Court of three judges denying an interlocutory injunction in a suit to restrain the enforcement of an order of the Missouri Superintendent of Insurance reducing rates for fire and allied classes of insurance. Another phase of the controversy was before this Court in 275 U. S. 440.

Mr. Robert J. Folonie, with whom *Messrs. John S. Leahy, William S. Hogsett*, and *Ashley Cockrill* were on the brief, for appellant.

Messrs. Floyd E. Jacobs and *John T. Barker*, with whom *Messrs. Stratton Shartel*, Attorney General of Missouri, and *G. C. Weatherby*, Assistant Attorney General, were on the brief, for appellees.

MR. JUSTICE BUTLER delivered the opinion of the Court.

This is one of 155 suits brought by stock insurance companies to have § 6283, Revised Statutes of Missouri, 1919, adjudged invalid and to restrain the enforcement of an order of the state superintendent of insurance promulgated October 9, 1922, on the ground that the section and order are repugnant to the due process and equal protection clauses of the Fourteenth Amendment. In each case there was an application to a court of three judges for an interlocutory injunction. 28 U. S. C., § 380. It was denied, without prejudice to renewal upon condition specified, in 114 cases of which this is one, and it was granted in 41 cases. 34 F. (2d) 185. This is an appeal from the denial of plaintiff's application. 28 U. S. C., § 345(3).

Section 6283 provides:

"The superintendent of insurance . . . is hereby empowered to investigate the necessity for a reduction of rates, and if, upon such investigation, it appears that the result of the earnings in this state of the stock fire insurance companies for five years next preceding such investigation shows there has been an aggregate profit therein in excess of what is reasonable, he shall order such reduction of rates as shall be necessary to limit the aggregate collections . . . to not more than a reasonable profit. Any reduction ordered . . . shall be applied subject to his approval: *Provided,* that the superintendent of insurance shall designate the class or classes to which the reduction shall be applied if the companies do not, within thirty days from the order of reduction, submit a class or classes which meet his approval. . . ."

Section 6284 provides that the orders of the superintendent shall be reviewable by the courts, that upon such review the entire matter shall be determined *de novo,*

and that while it is pending insurers shall not charge any rate in excess of that fixed by the superintendent.

January 5, 1922, the superintendent had directed that rates on all fire, lightning, hail and windstorm insurance be reduced 15 per cent. The plaintiff and other stock insurance companies doing businss in Missouri brought a joint suit in the circuit court of Cole county to enjoin the enforcement of that order. Temporary restraint was granted. The attorneys for the respective parties entered into a stipulation reciting that the superintendent had revoked the rate order and agreeing that there be entered of record in the case an order in substance as follows:

The case is dismissed and the restraining order dissolved.

The superintendent may call a hearing to investigate the necessity for a rate reduction; the companies will produce evidence required by him or that they may see fit to present; at the conclusion of the hearing he will make findings of fact and announce his determination thereon, and he shall also make certain specified findings.

If based on such findings and determination, an order be made reducing rates, it will apply alike to all classes of risks and, if dissatisfied, the companies will proceed to secure a review of the order in the circuit court of Cole county.

No injunction to restrain the reduction shall be applied for; but, pending such review and until final determination of the case, the rates in force prior to the making of the order will be collected by the companies and they will "give bond, conditioned and in such amount as the court may direct, to refund to the assured any excess of premiums collected by them if such order . . . be finally sustained by decree or judgment of a court of last resort."

The question of the constitutionality of §§ 6283 and 6284 will not be raised nor will the legality of the hearing provided for be questioned.

October 9, 1922, the superintendent made the order that is the subject of this suit. It directed that, effective November 15, rates be reduced 10 per cent. November 10, plaintiff and other companies brought the matter before the court named in the stipulation for review. Upon the requirement of the court they executed a bond for the use of those to whom insurance policies might be issued by them prior to final decree. That court held the rates confiscatory and set aside the order. Its judgment was reversed in the state supreme court. 315 Mo. 113. The case was brought here and, January 3, 1928, was dismissed on the ground that no federal question was presented. *Aetna Insurance Co.* v. *Hyde,* 275 U. S. 440.

February 1, 1928, the superintendent designated the classes of risks to which the reduction should be applied, and thereupon this suit was commenced. The district court found the stipulation valid and that under it plaintiff, and other companies in whose behalf it was made, had collected rates in excess of those prescribed and had failed to refund. On that ground the court denied plaintiff's application, but without prejudice to renewal after repayment.

Plaintiff contends that the stipulation made in the earlier case by the attorneys for all the companies cannot operate against it in this case. The stipulation shows that when it was made another rate reduction was contemplated. All its provisions, except the one dismissing the review then pending, relate to procedure to be followed in making the reduction and for review. In lieu of the rule that during the pendency of the review insurers should not charge any rate in excess of those fixed

by the superintendent (§ 6284), it was arranged that the rates existing prior to the order should continue to be charged until final determination of the case. The companies were to give a bond to be fixed by the court to secure refund should the reduction finally be sustained. It is clear that the stipulation was intended to apply to the subsequent order and to any review of it.

But plaintiff insists that the stipulation contains no promise to refund. The pertinent language is quoted above. The stipulation and order constituted the only basis of the companies' right to continue to collect the higher premiums. When read having regard to the circumstances and context, the quoted language reasonably may be construed to be a promise by each company to return to its policy holders the excess charges paid by them pending final determination of the validity of the reduction.

Plaintiff claims that the superintendent failed to make the specified findings and so relieved it from any obligation under the stipulation. An affidavit filed in support of its motion for temporary injunction states that the superintendent did not make these findings. The order is not in the record. The plaintiff failed to present the findings that were made. There is no showing that the companies produced the information called for by the superintendent or that he was not lawfully excused from making such findings. We may notice the record of that case in this court.* 275 U. S. 440. The order is there

* *Butler* v. *Eaton*, 141 U. S. 240, 243. *Aspen Mining & Smelting Co.* v. *Billings*, 150 U. S. 31, 38. *Washington & Idaho R'd.* v. *Coeur D'Alene Ry.*, 160 U. S. 101. *Craemer* v. *Washington*, 168 U. S. 124, 129. *Bienville Water Supply Co.* v. *Mobile*, 186 U. S. 212, 217. *Dimmick* v. *Tompkins*, 194 U. S. 540, 548. *Fritzlen* v. *Boatmen's Bank*, 212 U. S. 364, 370. *de Bearn* v. *Safe Deposit Co.*, 233 U. S. 24, 32. *Freshman* v. *Atkins*, 269 U. S. 121, 124. *United States* v. *California Canneries*, 279 U. S. 553, 555. *Cf. Pickford* v. *Talbott*, 225 U. S. 651, 654.

fully set forth. It states that the companies refused to furnish the superintendent the necessary facts and that accordingly such findings could not be made. Clearly plaintiff's showing is not sufficient to require the court to find that the superintendent was not excused by the companies' refusal to furnish information as agreed.

Plaintiff contends that the collection of the higher rates was not made pursuant to the stipulation. It does not appear whether, in addition to prescribing the bond, the court authorized the collection of higher premiums until final determination of the validity of the reduction. The stipulation was sufficient to support such an order, and there is nothing in the record to require a finding that one was not made. See *State ex rel. Hyde* v. *Westhues,* 316 Mo. 457, 466. In view of the requirement of § 6284 that pending review insurers shall not charge more than the reduced rates and in the absence of any other disclosed authority to continue to exact the higher premiums, it is right to attribute the excess charges to the promise to refund.

Plaintiff lays much emphasis upon the fact that it will suffer irreparable loss if compelled to apply the lower rates during the litigation and the order is finally held unlawful, whereas, if the temporary injunction be granted, policy holders may be protected by an appropriate provision in the decree. *Ohio Oil Co.* v. *Conway,* 279 U. S. 813, 815. But, in respect of plaintiff's right to have a temporary injunction, its position is not as good as it would have been if this suit had been brought when the rate order was passed. As against the joint attack the reduction has been sustained by the court of last resort. Plaintiff has not repaid the policy holders. It now assails the statute as well as the order and seeks again to prevent the taking effect of the prescribed rates. The retention of the higher premiums that it obtained by means of the stipulation and the denial of its promise to

refund are facts properly to be considered. Courts of equity frequently decline to interfere on behalf of a complainant whose attitude is unconscientious in respect of the matter concerning which it seeks relief. *Deweese* v. *Reinhard*, 165 U. S. 386, 390. While the rule which plaintiff invokes is one of general application, it cannot be said that the lower court erred in withholding relief until plaintiff makes good its promise to refund.

Plaintiff contends that, as the companies failed to submit, and the superintendent until February 1, 1928, did not designate the classes to which the reduction should be applied (§ 6283), the lower rates did not take effect until that time. But by the stipulation the parties agreed that such order should apply to all classes alike. That was a sufficient designation in advance. And the promise to refund, the bringing of the suit to review the reduction and the giving of the bond all support the view that, as to the companies making the stipulation, the rate reduction was then consummated. The court's imposition of the condition that excess premiums collected from November 15, 1922, be repaid is not without adequate support.

A decree of the district court denying an interlocutory injunction will not be reversed unless shown to be contrary to some rule of equity or the result of an improvident exercise of judicial discretion. *Meccano, Ltd.*, v. *John Wanamaker*, 253 U. S. 136, 141. *Chicago Great Western Ry.* v. *Kendall*, 266 U. S. 94, 100. Applying that rule we find no adequate ground for reversal.

Decree affirmed.

UNITED STATES *v.* WORLEY, ADMINISTRATRIX, ET AL.

CERTIFICATE FROM THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. 548. Argued March 4, 5, 1930.—Decided April 14, 1930.

1. A certified question (U. S. C., Title 28, § 346) need not be answered when objectionable because of its generality and when an answer is not necessary for the decision of the case. P. 340.
2. In an action on a war risk insurance contract the judgment should not include instalments maturing after the action began and as to which there was no supplemental petition, nor should it include instalments to mature in the future. P. 341.
3. Interest on the instalments is not allowable. *Id.*
4. Costs can not be awarded against the United States in such actions. P. 344.

ANSWERS to questions certified by the Circuit Court of Appeals in relation to a judgment of the District Court against the United States in an action on a war risk insurance contract.

Mr. Claude R. Branch, Special Assistant to the Attorney General, with whom *Messrs. J. Frank Staley* and *W. Clifton Stone* were on the brief, for the United States.

Mr. Clarence T. Spier, with whom *Mr. Charles Battelle* was on the brief, for Worley.

MR. JUSTICE BUTLER delivered the opinion of the Court.

The deceased enlisted in the army April 2, 1917, and was discharged March 18, 1918. He obtained insurance for $10,000 payable in the event of death or total permanent disability at the rate of $57.50 per month. Act of October 6, 1917, 40 Stat. 398, 409. The contract was in force when he was discharged. He presented to the Veterans' Bureau a claim for permanent total disability from

that date. It was rejected December 29, 1926. He died January 7, 1927.

April 23, his mother as administratrix brought this action in the United States court for Nebraska to recover on account of his disability from the date of discharge to the time of his death. 38 U. S. C., § 445. July 6, she intervened as beneficiary to recover installments maturing after his death. There was a verdict on which, October 31, 1928, judgment was entered in her favor as administratrix for $6,095 and as beneficiary for $3,905. Later the District Court entered a supplemental judgment that as beneficiary she was then entitled to $1,265 on account of the installments falling due before the original judgment; that the balance, $2,640, should be paid at the rate of $57.50 per month commencing November 1, 1928; that she have interest on all installments from the dates on which they became due to the date of judgment and thereafter interest on the amount of the judgment, and that she recover costs. The United States appealed. The Circuit Court of Appeals certified the four questions which are given below. 28 U. S. C., § 346.

"1. Upon the facts stated [in the certificate] does the United States, as matter of law, stand in the position of one who has gone into the business of insurance, and must, therefore, be assumed to have accepted the ordinary incidents of suits in such business?"

Apparently, this question was suggested by language in our decision in *Standard Oil Co.* v. *United States*, 267 U. S. 76, 79. While the answer sought might aid in the determination of the proper application of that opinion, it is not necessary for the decision of the case. The question is one of objectionable generality. *United States* v. *Mayer*, 235 U. S. 55, 66. It need not be answered.

"2. May judgment be entered against the United States for the amounts of insurance installments maturing after the action was instituted?"

Undoubtedly, when one's right to recover is established by judgment, the Veterans' Bureau will pay him installments maturing in his favor after the commencement of the action. It therefore is a matter of no practical importance whether the installments maturing between date of intervention and entry of the judgment be included. But the certificate does not disclose any supplemental petition in respect of such installments, and the judgment should not include them. *Hamlin, Hale & Co.* v. *Race,* 78 Ill. 422. *Carter-Crume Co.* v. *Peurrung,* 99 Fed. 888, 890.

Section 514, Tit. 38, U. S. C.,* provides that if the designated beneficiary does not survive the insured or dies prior to receiving all of the 240 installments, or all such as are payable and applicable, the present value of the monthly installments thereafter payable shall be paid to the estate of the insured. A judgment for the designated beneficiary for all installments thereafter to mature would not protect the United States against a claim by the estate of the insured for any installments falling due after the death of the beneficiary. The judgment should not govern payment of installments later to mature.

The question should be answered in the negative.

"3. Is interest allowable against the United States upon the monthly installments from the date they are found to be due?"

The rule is that the United States will not be required to pay interest except where the liability is imposed by statute or assumed by contract. An implied agreement to pay interest arises upon a taking by the United States of private property for public use where interest is an element in the just compensation guaranteed by the Constitution. *Seaboard Air Line Ry.* v. *United States,* 261

* § 303, Act of June 7, 1924, 43 Stat. 625 as amended by § 14, Act of March 4, 1925, 43 Stat. 1310.

U. S. 299, 304. Where the United States came into admiralty to assert a claim as owner *pro hac vice* of a vessel it thereby agreed by implication to accept whatever decision the courts might make, and was held liable for interest. *United States* v. *The Thekla,* 266 U. S. 328, 339–340. And see *The Nuestra Senora de Regla,* 108 U. S. 92, 104. *The Paquete Habana,* 189 U. S. 453, 465, 467.

Appellee relies on *Standard Oil Co.* v. *United States, supra,* a libel on war risk insurance policies issued upon an American vessel and its cargo under the War Risk Insurance Act of September 2, 1914, 38 Stat. 711. The United States was held liable for interest upon the ground that (p. 79): "When the United States went into the insurance business, issued policies in familiar form and provided that in case of disagreement it might be sued, it must be assumed to have accepted the ordinary incidents of suits in such business. The policies promised that claims would be paid within thirty days after complete proofs of interest and loss. . . ."

The Act authorized the Bureau to adopt and publish forms of policies and to establish reasonable rates. The policies adopted by the Bureau and used in that case contained a promise to pay losses within a specified time. Under that form of contract private underwriters are liable for interest when payment is not made as agreed. There was nothing in the statute to disclose an intention on the part of the United States to bear any part of the cost of the insurance or to give pecuniary aid to the owners of vessels or other property insured. And as a matter of fact a large profit resulted from the operation of the business. Annual Report of the Director of the U. S. Veterans' Bureau, 1923, p. 675.

On the other hand, the Act of October 6, 1917, discloses a purpose on the part of the United States to protect

those engaged in war service and their dependents and to contribute to their financial welfare. It provides for payment by the United States of family allowances in certain cases and of compensation for death or disability of officers, enlisted men and members of the army and navy nurse corps in active service resulting from injury or disease contracted in the line of duty. Arts. II and III.

And "in order to give to every commissioned officer and enlisted man and to every member of the Army Nurse Corps (female) and of the Navy Nurse Corps (female) when employed in active service under the War Department or Navy Department greater protection for themselves and their dependents than is provided in Article III" the United States provided life and disability insurance. Art. IV. Its benefits were extended without application therefor to those who were totally and permanently disabled or who died in active service after our entry into the war, April 6, 1917, and prior to the expiration of 120 days after the publication of the terms of the insurance. All such persons were deemed to have applied for and to have been granted insurance. § 401. The United States bore expenses of administration and excess mortality and disability cost resulting from the hazards of war. The insurance was limited to $10,000 and was made payable in 240 equal monthly installments; it was made not assignable nor subject to claims of creditors of the insured or of the beneficiary. The premiums were not adequate. The Congress intended that the United States should bear, and undoubtedly it has borne, a large part of the cost. Consequently the payments include both insurance and pension. *White* v. *United States*, 270 U. S. 175, 180.

The Act does not provide for the payment of any interest on past due installments. It has been uniformly construed by the Bureau not to allow any. There is noth-

ing in the conduct of the United States in respect of life and disability insurance from which an agreement on its part to pay interest may reasonably be implied.

This question is not within the principle upon which interest was allowed in *Standard Oil Co.* v. *United States, supra.* It should be answered in the negative.

"4. May costs be awarded generally against the United States, upon condition that they be paid from accumulated funds in the hands of the Veterans' Bureau, if any, available for that purpose?"

The rule is that in the absence of a statute directly authorizing it courts will not give judgment against the United States for costs or expenses. *United States* v. *Chemical Foundation,* 272 U. S. 1, 20. There is no statute permitting costs to be awarded against the government in this case.

The question should be answered in the negative.

Question 1 is not answered.
Question 2 is answered: No.
Question 3 is answered: No.
Question 4 is answered: No.

JACKSON *v.* UNITED STATES.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

No. 463. Argued March 4, 5, 1930.—Decided April 14, 1930

A judgment against the United States for accrued instalments under a war risk policy of insurance against permanent total disability should not include interest.

34 F. (2d) 241, affirmed.

CERTIORARI, 280 U. S. 549, to review a judgment of the Circuit Court of Appeals which reversed a judgment of the District Court, 24 F. (2d) 981, in an action on a war risk insurance policy.

Mr. Thomas Amory Lee, with whom *Mr. Turner W. Bell* was on the brief, for petitioner.

Mr. Claude R. Branch, Special Assistant to the Attorney General, with whom *Attorney General Mitchell* and *Messrs. J. Frank Staley, W. Clifton Stone,* and *Erwin N. Griswold* were on the brief, for the United States.

Messrs. Milo J. Warner and *Robert Newbegin* filed a brief as *amici curiae,* by special leave of Court.

Mr. Justice Butler delivered the opinion of the Court.

This action was brought in the United States court for Kansas to recover for permanent total disability on a war risk insurance policy. The court gave plaintiff judgment for the amount of the accrued installments with interest on each to date of the judgment, and directed that the judgment bear interest until paid. 24 F. (2d) 981. The United States took the case to the Circuit Court of Appeals and there contended that plaintiff was not entitled to interest. The Circuit Court of Appeals rightly reversed the judgment. 34 F. (2d) 241.

The case is ruled by this court's decision on the third question certified in *United States* v. *Worley,* announced this day, *ante,* p. 339.

Judgment affirmed.

NEW YORK CENTRAL RAILROAD COMPANY *v.* MARCONE, ADMINISTRATOR.

CERTIORARI TO THE COURT OF ERRORS AND APPEALS OF NEW JERSEY.

No. 212. Argued February 25, 26, 1930.—Decided April 14, 1930.

1. On the evidence it was for the jury to say whether the railroad company exercised due care in moving an engine in a round-house at night without more effective and specific warning than the

sounding of the whistle and bell, and whether the failure to give such other warning was the cause of the death of an employee who had been working close to the track, it appearing that whistles and bells were being constantly operated in the round-house to test them as well as to warn of engine movements, and there being also evidence tending to prove a custom to post the times at which engines were to be removed as a warning to those employed about them, and that the movement in this case was earlier than the time posted for the engine. P. 349.

2. Under the Federal Employers' Liability Act contributory negligence is not a bar to recovery unless it is the sole cause of the injury or death, but may be taken into consideration by the jury in fixing the amount of damage. P. 350.

3. The work of lubricating, in a round-house, an engine that was last used in hauling interstate trains and has not been withdrawn from service is employment in interstate commerce. P. 350.

4. The workman who has finished such a job is still employed in interstate commerce within the meaning of the Employers' Liability Act if injured within a few minutes of its completion and while on duty in the round-house awaiting instructions from his superior. P. 350.

105 N. J. L. 466, affirmed.

CERTIORARI, 280 U. S. 540, to review a judgment of the Court of Errors and Appeals of New Jersey affirming a recovery under the Employers' Liability Act.

Mr. William H. Carey, with whom *Mr. Albert C. Wall* was on the brief, for petitioner.

Mr. A. Owsley Stanley argued the cause, and *Mr. Alexander Simpson* was on the brief, for respondent.

MR. JUSTICE STONE delivered the opinion of the Court.

The respondent, plaintiff below, brought suit in the Circuit Court of Hudson County, New Jersey, to recover under the Federal Employers' Liability Act, for the death of his intestate. Judgment for plaintiff was affirmed by the Court of Errors and Appeals of New Jersey. 105 N. J. L. 466. This Court granted certiorari, 280 U. S.

540, on a petition which asserted as grounds for allowing the writ that the court below had erroneously decided that there was evidence that at the time of the accident deceased was engaged in interstate commerce; that there was evidence of negligence on the part of petitioner; and that deceased's death was not due to his own negligence.

Decedent was employed in the roundhouse of petitioner at New Durham, New Jersey, in which there are thirty-two engine stalls, the doors to which are adjacent to and distant about 68 feet from a turntable. His duty was to fill the grease cups and pack the journal boxes of engines while in the roundhouse for inspection. On the night of the accident his hours of duty were from 7 P. M. to 3 A. M. He had worked on fourteen engines, using tools which were placed on an inspection wagon, which was moved from engine to engine along a concrete runway extending in front of the engine stalls along the outer circumference of the roundhouse. He had lubricated and completed work on Engine No. 3709 on Track 8 before eleven o'clock in the evening. The last engine he worked on was No. 3835, standing on Track 7, adjacent to Track 8 on its left when facing the roundhouse. Fellow workmen, who had finished work on the same engine before the deceased, had been sent to do work outside the roundhouse. At about 2:15 A. M. deceased was instructed by his foreman or gang leader to work on Engine 3835 and when finished to wait for the foreman at the inspection wagon which was then located on the concrete runway in front of the open space lying between Track 7 and Track 8.

There was no eye witness to the accident. At about 2:35 A. M. the decedent's body, with head and one arm severed, was discovered on the right-hand rail of Track 8, adjacent to Track 9, underneath the trucks of the tender of Engine No. 3709, which was then being backed on Track 8 from the roundhouse to the turntable. His cap

was found between the rails of Track 8, about 15 feet outside of the door of the roundhouse. Blood stains were found on or near the right-hand rail of Track 8, beginning about 30 feet from the roundhouse and extending to the point where the body was found, some 60 feet or more from the door of the roundhouse.

The hostler who removed the engine from the roundhouse testified that before moving it he inspected Track 8, that he saw no one on or near the track, that he then mounted the engine, started the air pump, turned on the headlight, rear light and cab lights, started the engine bell ringing and blew three blasts of the whistle as a warning that he was about to back the engine out and as notice to the operator of the turntable. At about 2:30 A. M., some ten minutes after mounting the engine, he backed the engine toward the turntable at the rate of about four miles an hour, looking behind as he did so. The operator of the turntable not responding to the signal, he stopped the engine, blew three more blasts and when the turntable was set he again started the engine and proceeded until decedent's body was discovered.

When backing the engine the tender cut off the view of the track for a distance of about 12 feet from its rear end. The clearance between Engine No. 3709, which killed deceased, and the sides of the door to the roundhouse was about 4 inches, and between it and the engine on Track 7 was variously estimated from about 2 feet to about 3 feet 9 inches. There was much evidence that there was constant blowing of whistles and ringing of bells in the roundhouse in connection with moving the engines and testing their whistles and bells. There was testimony by the hostler, confirmed by his foreman, that just before the movement of the engine in question the foreman cautioned him not to blow the whistle "too loud" because of complaints and warnings by the local police on account of the noise coming from the roundhouse.

Under all the circumstances disclosed by the evidence, it was a permissible inference by the jury that the sounding of whistle and bell, because of the continuous noise of whistles and bells which did not indicate movement of engines, was not sufficient warning that any particular engine was to be moved and that in fact the signal given before moving the engine in question was insufficient for that purpose. In addition, there was testimony that there was a system or custom in the roundhouse of giving warning to the men employed about the engines when they were to be removed from the roundhouse, by posting the time of removal on a blackboard located on the inside of the outer wall of the roundhouse. The time posted for the engine in question was 3 A. M., or a half hour later than the actual time of its removal. There was evidence that the foreman had warned the hostler not to take the engine out "too early." There was also evidence tending to show that the time posted on the blackboard had no reference to the time of removal of the engine from the roundhouse but merely indicated the time at which the engine must be ready for the engine crew on the appropriate siding in the yard beyond the turntable.

But the inference to be drawn from this testimony as to the existence of the custom, its purpose and the reliance which deceased under all the circumstances was entitled to place upon it, was for the jury. We think that there was sufficient evidence of petitioner's negligence to take the case to the jury. Workmen were constantly moving about the engines stalled in the roundhouse. Any movement of an engine without warning was dangerous to life and limb. After the hostler mounted the engine and before it was moved, sufficient time elapsed for the deceased to come into proximity with it which was dangerous if, as the jury might have found, he could not be seen from the engine cab by the

hostler and was not warned of the impending movement. On the evidence it was for the jury to say whether petitioner exercised due care in moving the engine without a more specific and effective warning and whether failure to give it was the cause of the death.

The jury, having found, as it might, that the negligence was the cause of the death, might also have inferred that the deceased was guilty of contributory negligence, but the trial judge correctly charged that under the Federal Employers' Liability Act contributory negligence is not a bar to recovery unless it is the sole cause of the injury or death, and may be taken into consideration by the jury in fixing the amount of damage.

The engine, No. 3835, on which deceased last worked was used in hauling interstate trains. It was not withdrawn from service. See *Walsh* v. *N. Y., N. H. & H. R. R. Co.*, 223 U. S. 1; *Erie Railroad* v. *Szary*, 253 U. S. 86; cf. *Industrial Commission* v. *Davis*, 259 U. S. 182. But petitioner contends that deceased, having finished his work, was no longer employed in interstate commerce. The trial court submitted to the jury the question whether deceased had finished his work on this engine at the time of the accident, and there was some evidence to support a finding that he had not finished it. But if we assume that he had completed the work a few minutes before his death, he was still on duty. His presence on the premises was so closely associated with his employment in interstate commerce as to be an incident of it and to entitle him to the benefit of the Employers' Liability Act. *Erie Railroad* v. *Szary, supra; Erie Railroad Co.* v. *Winfield*, 244 U. S. 170, 173; see *North Carolina R. R. Co.* v. *Zachary*, 232 U. S. 248, 260; *Hoyer* v. *Central Railroad Co. of New Jersey*, 255 Fed. 493, 496, 497.

Affirmed.

ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY *v.* TOOPS, ADMINISTRATRIX.

CERTIORARI TO THE SUPREME COURT OF KANSAS.

No. 303. Argued March 6, 7, 1930.—Decided April 14, 1930.

1. To justify recovery in an action under the Federal Employers' Liability Act, there must be evidence from which the jury could find that the negligence complained of was the cause of the injury. P. 354.
2. The jury may not be permitted to speculate as to the cause of the injury; and the case must be withdrawn from its consideration unless there is evidence from which it may reasonably be inferred that the injury was caused by the employer's negligence. *Id.*
3. Evidence considered, and found insufficient to go to the jury on the question whether the death of a railroad conductor, who was run down by freight cars during a switching operation at night and in the absence of eye witnesses, was due to negligence in moving the cars without signal and without placing a light or flagman upon them. Pp. 352–355.

128 Kan. 189, reversed.

CERTIORARI, 280 U. S. 542, to review a judgment affirming a recovery for death, in an action under the Federal Employers' Liability Act.

Messrs. William Osmond and *William R. Smith*, with whom *Messrs. E. E. McInnis, Owen J. Wood, Alfred A. Scott*, and *Alfred G. Armstrong* were on the brief, for petitioner.

Mr. Carr W. Taylor, with whom *Mr. James N. Farley* was on the brief, for respondent.

MR. JUSTICE STONE delivered the opinion of the Court.

Respondent, plaintiff below, brought suit in the District Court of Reno County, Kansas, to recover under the Federal Employers' Liability Act for the death of her

intestate. Judgment in her favor was affirmed by the Supreme Court of Kansas, 128 Kan. 189. This Court granted certiorari, 280 U. S. 542, on a petition which urged as grounds for allowance of the writ that there was no evidence of negligence in the case or that any act of petitioner caused the death.

Decedent was a conductor in charge of petitioner's freight train, engaged in interstate commerce, while en route easterly from Elkhart to Dodge City, Kansas. He was killed near the station at Rolla, Kansas, at about one o'clock in the morning, in the course of a switching operation under his direction. At that point, north of the main line and connected with it by switches, is a "passing track" with an extension at its easterly end known as a "stock track." South of the station, which is south of the main line, is a switching track, referred to as an "elevator track," which forms a junction with the main line some three hundred feet or more east of the station platform.

On the night of the accident two switching operations were to be carried out by deceased at Rolla. The first, which was successfully completed, consisted of removing four loaded grain cars from the elevator track and coupling them, deceased assisting, to the train standing west of the station on the main line. The second involved the removal of fifteen empty grain cars, coupled to twelve stock cars, from the passing and stock tracks to the main line and thence "kicking" the grain cars onto the elevator track, that is, the train of grain and stock cars was to be pushed by the engine westerly along the main line and the fifteen grain cars uncoupled from the westerly end of the stock cars while still in motion and before the stock cars had reached the switch to the elevator track, thus propelling the grain cars from the main line to the elevator track. The stock cars were then to be kicked back onto the passing track by a similar movement, after

which the engine was to be coupled to the grain cars standing on the elevator track and they were to be spotted at desired locations on that track. Under the rules of petitioner, deceased was required to attend personally to these switching movements.

There were no eye witnesses to the accident. Deceased was last seen alive, standing, lantern and train book in hand, on the east end of the station platform. Plaintiff's own witnesses testified, without contradiction, that shortly before, one of the two brakemen of the train crew had read to the other and to deceased the switching list calling for the movement of the grain cars, and had then said that he would kick the cars onto the elevator track, to which deceased replied: "All right I will look out for them." After the grain cars had been kicked onto the elevator track and the stock cars onto the passing track, the engine was coupled to the grain cars and the spotting movement begun, when the body of the deceased was discovered. It was lying under the engine tender diagonally across the elevator track, with the shoulder against a "derail" about 180 feet west of the switch, connecting the elevator track with the main line, and about the same distance from the point on the platform where decedent had last been seen alive. His feet were toward the north, his head and arm had been severed from his body and lay just south of the track. His cap, lantern and lead pencil were lying near, together, south of the elevator track two or three feet from the south rail. His train book was found lying in the center of the track between the rails. The surface of the track between the rails showed that his body, after it had fallen to the ground, had been moved or dragged westward two or three feet until his shoulders were jammed against the derail. There were no marks of flesh or blood on any part of the first grain car, indicating that it had come into contact with the body of the deceased. There was uncontradicted testi-

mony that such marks of flesh and blood were found upon the south wheels of each of the succeeding fourteen grain cars and the engine tender.

It was controverted whether, within the meaning of printed rules of petitioner, the place of the accident was at a "station" or in a "yard." The rules required that when cars were pushed by an engine "except when shifting or making up trains in yards," a flagman should be placed on the front of the leading car so as to signal the engineer in case of need, and that a white light must be placed on the leading car at night. No flagman or brakeman, and no light was placed on the leading grain car. Owing to the location of a curve and cut through which the grain cars passed in order to reach the elevator track, it was impossible for the engineer or the two brakemen to see deceased or his lantern at the point where his body was found. There was evidence that no warning signal by bell or whistle was given in the course of the kicking movement.

It is the theory of the respondent, conforming to the findings of the jury in its special verdict, that deceased, while crossing the track near the derail, where, according to some of the testimony the roadbed was overgrown with weeds and so thinly ballasted that the track had become "skeletonized," was knocked down by the leading grain car and killed by that and the succeeding cars passing over him, and that his death was attributable to negligence in carrying out the kicking movement of the grain cars without signal and without placing a flagman or a light on them.

But proof of negligence alone does not entitle the plaintiff to recover under the Federal Employers' Liability Act. The negligence complained of must be the cause of the injury. The jury may not be permitted to speculate as to its cause and the case must be withdrawn from its consideration unless there is evi[illegible]m from which

the inference may reasonably be drawn that the injury suffered was caused by the negligent act of the employer. *Patton* v. *Texas & Pac. Ry. Co.*, 179 U. S. 658; *New Orleans & N. E. R. R. Co.* v. *Harris*, 247 U. S. 367, 371; *St. Louis & San Francisco Ry. Co.* v. *Mills*, 271 U. S. 344, 347; *C. M. & St. P. Ry.* v. *Coogan*, 271 U. S. 472; *New York Central Railroad Co.* v. *Ambrose*, 280 U. S. 486.

Even though we assume that in all the respects alleged the petitioner was negligent, the record does not disclose any facts tending to show that the negligence was the cause of the injury and death. The only evidence relied upon by respondent to account for the deceased's presence at the point of the accident was that already stated, which indicated that he had proceeded to the elevator track in order, as he said, to "look out" for the kicked cars, whether by climbing onto them and controlling their movement on the elevator track, as is usual in such movements, or by assisting in the spotting movement to be later carried out, can only be inferred. It is the theory of respondent that he attempted to cross the track so as to be in a position to signal the engineer who was on that side of the train. But as the grain cars already were, or were about to be, uncoupled from the train, there was evidently no immediate purpose in his being so located. What actually took place can only be surmised. Whether he was run down on the track by the first car or he attempted unsuccessfully to board the train on one side or the other or succeeded and in either case finally came to his death by falling under or between the moving cars is a matter of guesswork.

Even though we make the doubtful assumption that the train was not within a "yard" and so was required to signal its movements, it is plain that deceased and his train crew treated the place as a yard where warning of switching movements was not required. On respondent's own theory deceased was fully cognizant of the

contemplated movement. He knew that the grain cars were to be kicked onto the elevator track where he went to meet them, and knew that his train crew, consisting of only two brakemen, and the lanterns which they carried, would be needed in attending to the switching, signalling and uncoupling of cars in order to kick the train of stock cars onto the passing track and that the grain cars for which he was to "look out" would be without brakeman or warning light. It is presumed that deceased proceeded with diligence and due care. *Looney* v. *Metropolitan R. R. Co.*, 200 U. S. 480, 488. The movement of the fifteen cars to and across the switch and onto the elevator track in a quiet neighborhood on a still night can not be assumed to have given no warning sounds of their approach.

All these factors taken together render highly improbable the theory of respondent that deceased was run down by the grain cars while he was crossing or standing upon the track, and they give sharp emphasis to the absence of any proof of the fact, indispensable to respondent's case, that deceased, while standing on or attempting to cross the track, was struck by the leading car. There is no evidence to suggest that the body, after falling to the ground, was moved or dragged more than two or three feet. There were no marks of blood or flesh of the decedent upon any part of the leading car, although such marks were found on most if not all of the cars following. The kicked grain cars were moving slowly when they passed the switch to the elevator track as they came to a stop two or three car lengths west of the derail. It is true that there was medical testimony that in the case of crushing injuries bleeding might not immediately ensue, but the length of this period of delay was not mentioned and the testimony given was not stated by any witness to be applicable to injuries of the extent and character suffered by the deceased. It does not account

for the absence from the leading car of the other evidences of the injury found on the other cars. As evidence to support the special finding of the jury that the deceased was struck by the first car, this testimony is without substance. See *Gulf, Mobile & Northern R. R.* v. *Wells,* 275 U. S. 455. If allowed to sustain the verdict it would remove trial by jury from the realm of probability, based on evidence, to that of surmise, and conjecture.

Reversed.

NILES BEMENT POND COMPANY *v.* UNITED STATES.

CERTIORARI TO THE COURT OF CLAIMS.

No. 314. Argued March 7, 12, 1930.—Decided April 14, 1930.

1. Findings by the Court of Claims that the controlling plan of a taxpayer's accounts was to show income upon an accrual basis and that its tax returns were on that basis, are conclusive on review. P. 360.
2. Under the Revenue Acts of 1916 and 1918, the Commissioner may correct a return so as to reflect true income by conforming to the dominating and controlling character of the taxpayer's system of accounts. *Id.*
3. In computing the net income of a domestic corporation keeping its books on the accrual basis, foreign taxes paid in the tax years should not be deducted if they accrued in prior years and their deduction in those years was necessary to ascertain true income. *Id.*
4. It is to be presumed that taxes paid are rightly collected upon assessments correctly made by the Commissioner; and in a suit to recover them the burden rests upon the taxpayer to prove all the facts necessary to establish the illegality of the collection. P. 361.

67 Ct. Cls. 693, affirmed.

CERTIORARI, 280 U. S. 543, to review a judgment for the United States in a suit to recover money alleged to have been illegally collected as income and excess profits taxes.

Mr. Karl D. Loos, with whom *Messrs. E. Barrett Prettyman* and *Preston B. Kavanagh* were on the brief, for petitioner.

Mr. Claude R. Branch, Special Assistant to the Attorney General, with whom *Attorney General Mitchell, Assistant Attorney General Youngquist, Messrs. Sewall Key* and *Barham R. Gary,* Special Assistants to the Attorney General, *Ralph C. Williamson, Clarence M. Charest,* General Counsel, and *Ottamar Hamele,* Special Attorney, Bureau of Internal Revenue, were on the brief, for the United States.

MR. JUSTICE STONE delivered the opinion of the Court.

This case is here on certiorari, 280 U. S. 543, to review a judgment of the Court of Claims denying recovery of a part of petitioner's income and excess profits taxes for the year 1918, alleged to have been illegally exacted. 67 Ct. Cls. 693. Petitioner is a New Jersey corporation having an office and principal place of business in New York. It maintains a London branch, through which it paid the British government in 1918 income tax for the fiscal year April 6, 1917 to April 5, 1918, upon income received from sources in Great Britain in 1916 and earlier years, and based on a tax return made prior to 1918. Similarly, it paid in 1918 a tax for the year ending December 31, 1916, upon income and excess profits from sources within Great Britain. In making its tax return for the year 1918 petitioner deducted these payments from gross income. The Commissioner of Internal Revenue refused to allow the deductions, and collected a correspondingly increased tax, which is the subject of the present suit.

The applicable provision of § 238 of the Revenue Law of 1918, c. 18, 40 Stat. 1057, authorizes the deduction from the gross income of corporations, income and excess profits taxes "paid" to foreign countries during the taxa-

ble year. But § 200 defines the term "paid" in § 238 as "paid or accrued" or "paid or incurred," and provides that "paid or accrued" shall be construed according to the method of accounting upon the basis of which the net income is computed under § 212. Section 212 (b) requires that net taxable income shall be computed "in accordance with the method of accounting reguarly employed in keeping the books of such taxpayer; but if no such method of accounting has been so employed or if the method employed does not clearly reflect the income, the computation shall be made upon such basis and in such manner as, in the opinion of the Commissioner does clearly reflect the income."

Section 13 (d) of the Revenue Act of 1916, c. 463, 39 Stat. 756, in force until the Act of 1918 became effective, provided that a corporate taxpayer "keeping accounts upon any basis other than that of actual receipts and disbursements, unless such other basis does not clearly reflect its income, may, subject to regulations made by the Commissioner of Internal Revenue with the approval of the Secretary of the Treasury, make its return upon the basis upon which its accounts are kept, in which case the tax shall be computed upon its income as so returned." Treasury Decision 2433 of January 8, 1917, interpreting this section, states: "This ruling contemplates that income and authorized deductions should be computed and accounted for on the same basis," and Income Tax Ruling, January–June, 1921, Cum. Bulletin No. 4, p. 147, provides: "Section 13 (d) of the Revenue Act of 1916 is a qualifying section and when accounts of a corporation are kept on a basis other than that of receipts and disbursements, it qualifies the manner of making deductions authorized in § 12 (a) of the Act, and the word 'paid' in the latter section is to be read 'paid or accrued,' depending on how the accounts of the corporation are kept."

The Court of Claims found that the books of the petitioner were kept on the accrual basis; that while there were some exceptions of small items of deferred charges and credits and the expenses of the London office which were entered on its books only when paid or received, "the principal and dominant purpose and plan of its accounts were to show income upon an accrual basis as the general and controlling character of the account." It also found that the petitioner's return for 1918 was on the accrual basis, as were its tax returns for 1916, 1917 and 1919.

These findings are conclusive here. *Luckenbach S. S. Co.* v. *United States*, 272 U. S. 533, 538. Under them petitioner's liability for the tax collected must turn on the propriety of deducting the foreign tax payments from income for the year 1918, when paid, in order to arrive at the true income of the taxpayer. Under the 1916 Act where the taxpayer's books are kept and his returns made on the accrual basis, taxes charged on the books as they accrue must be deducted when accrued, if true income is thus reflected. *United States* v. *Anderson*, 269 U. S. 422. Even if not so charged, it was competent for the Commissioner, under the Act of 1916, as well as under the express provisions of § 212 (b) of the Act of 1918, to correct the taxpayer's return by deducting the payments in the year in which they accrued so as to reflect true income by conforming to the dominating or controlling character of the taxpayer's system of accounts. *United States* v. *American Can Co.*, 280 U. S. 412. See *United States* v. *Mitchell*, 271 U. S. 9, 12–13.[1]

[1] Treasury Regulations 45 (1920 Ed.) promulgated under the Revenue Act of 1918 contained the following:

"ART. 23. *Bases of computation.*—(1) Approved standard methods of accounting will ordinarily be regarded as clearly reflecting income. A method of accounting will not however, be regarded as clearly

The findings do not disclose whether the foreign taxes paid in 1918 had accrued in that or in earlier years, or whether under the petitioner's system of bookkeeping their deduction in some earlier year was necessary in order to ascertain true income. But the presumption is that taxes paid are rightly collected upon assessments correctly made by the Commissioner, and in a suit to recover them the burden rests upon the taxpayer to prove all the facts necessary to establish the illegality of the collection. *United States* v. *Anderson, supra;* see *United States* v. *Rindskopf,* 105 U. S. 418. In the absence of findings determining the fact, it cannot be assumed in petitioner's favor that the British taxes paid in 1918 did not accrue earlier, or that their deduction if made in 1918, would reflect truly the income of the taxpayer whose books and tax return were on the accrual basis.

Petitioner argues that as its payments of foreign taxes were charged on its books in the year when paid, as were other expenses of the London branch, its return was made on the basis upon which its accounts were kept and that under § 13 (d) its tax should have been computed upon its income as so returned, if that method reflected true income. It is insisted that in the absence of a finding to the contrary, this must be assumed, since the Commissioner made no readjustment of petitioner's account of the London office expenses, except the item of foreign taxes, and as it affirmatively appears in the findings that returns were made and accepted on the same basis as the

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reflecting income unless all items of gross income and all deductions are treated with reasonable consistency. See section 200 of the statute for definition of 'paid', 'paid or accrued', and 'paid or incurred' . . . in any case in which it is necessary to use an inventory, no accounting in regard to purchases and sales will correctly reflect income except an accrual method. See section 213 (a) of the statute."

This regulation has been continued without material change.

1918 return, for the tax years 1919 and 1924. But this argument likewise rests upon the assumption of facts which are without support in the findings; that the other expenses of the London office for 1918 and the foreign tax payments deducted in the 1919 and 1924 returns did not accrue in those years. If that assumption is made, failure of the Commissioner to correct the returns in these respects is as attributable to his error or oversight or lack of information as to any opinion on his part as to the propriety of the deductions in the years made.

Affirmed.

DOHANY *v.* ROGERS, STATE HIGHWAY COMMISSIONER OF MICHIGAN, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN.

No. 338. Argued March 14, 1930.—Decided April 14, 1930.

1. Decisions of the state supreme court as to the propriety of condemnation proceedings under the state constitution and laws, *followed* in a suit brought in the federal court to enjoin like condemnation proceedings involving the same project and contract. P. 365.
2. A state highway project included in the highway an adjacent railroad right of way, to be acquired from the railroad in exchange for other lands which the State was to condemn and upon which the railroad was to be relocated. *Held* that the taking of private land to be so exchanged is a taking for a public purpose. P. 365.
3. Requiring a land-owner to surrender possession in condemnation proceedings before he is paid is not a denial of due process so long as payment is insured by the State. P. 366.
4. In a suit in the District Court to enjoin proceedings whereby the State of Michigan sought to take private land in order to exchange it with a railroad company for other land desired by the State for highway purposes, the land-owner claimed the right to have the proceeding brought under the Railway Condemnation Act which allows consequential damages and damages without deduction of benefits, and that another statute, by authorizing

condemnation under the Highway Condemnation Act, deprived him of these and other rights in violation of the due process and equal protection clauses of the Fourteenth Amendment. In view of decisions of the state supreme court in like cases, *held* that there is no ground for anticipating that just compensation will be denied in this instance, or that any advantages given by the Railway Act with respect to the amount of compensation for the land taken or the deduction of benefits, will be withheld. P. 367.

5. Attorneys' fees and expenses are not embraced within just compensation for land taken by eminent domain. P. 368.
6. Allowing attorneys' fees to land-owners in condemnation proceedings brought by railroad companies but not in those brought by the State is not a denial of the equal protection of the laws. P. 368.
7. The due process clause does not guarantee to land-owners the right of trial by jury in condemnation cases, nor the right of appeal. P. 369.
8. The equal protection clause permits of different procedure in condemnation suits brought by the State from that prescribed where the actor is a private corporation. P. 369.
9. A decree dismissing the bill in an injunction suit tried before three judges (Jud. Code, § 266) may properly be attested by one of the judges when authorized by opinions signed by all. P. 369.

33 F. (2d) 918, affirmed.

APPEAL from a decree of the District Court of three judges dismissing a bill for an injunction.

Mr. Frank H. Dohany, pro se.

Messrs. Wilber M. Brucker and *Kit F. Clardy* for Rogers.

Messrs. Frederic T. Harward and *H. V. Spike* were on the brief for the Detroit, Grand Haven & Milwaukee Railway Company and the H. W. Nelson Company.

MR. JUSTICE STONE delivered the opinion of the Court.

This is an appeal under § 266 of the Judicial Code from a decree of a district court of three judges, for the Eastern

District of Michigan, dismissing appellant's complaint. The suit was brought to enjoin the State Highway Commissioner and others from acquiring a right of way for railway use, across land of the appellant, and from prosecuting a proceeding in the state courts for the acquisition of the right of way, by condemnation, on the ground that the state statutes under which the proceeding was had infringed the state constitution and the Fourteenth Amendment of the Federal Constitution.

The State Highway Commissioner is engaged in carrying out a project for the construction and widening of a state highway between Detroit and Pontiac, Michigan, which, for several miles, adjoins the right of way of the respondent, Detroit, Grand Haven & Milwaukee Railway Company. As a part of the project, it is proposed to include in the highway the adjacent railroad right of way. This is to be acquired by relocating the railway on lands to be taken in the pending condemnation proceedings, and exchanged for the present right of way. As authorized by No. 215 of the Michigan Public Acts of 1925 and No. 340 of the Acts of 1927, the Commissioner has entered into a contract with the railroad company for the proposed exchange, to be effected when the Commissioner has acquired, by purchase or eminent domain, the lands on which the railroad is to be relocated. Acting under No. 352 of the Michigan Public Acts of 1925, as amended by No. 92 of the Acts of 1927, the Commissioner has begun, in the Probate Court of Oakland County, the proceeding which the appellant seeks to enjoin in the present suit.

In proceedings brought under the act last mentioned, commissioners appointed by the court fix the compensation for lands taken, after a hearing, and are required to assess the benefits accruing to land owners by reason of the establishment of the highway. Review may be had by certiorari. Proceedings brought by incorporated rail-

way companies for condemnation of property for railway use, so far as relevant to the present inquiry, are governed by other statutes. Railway Condemnation Statutes, §§ 8249–8257, Michigan Comp. Laws (1915). Under them the land owner, it is contended, is accorded rights or privileges withheld from him by the Highway Condemnation Act. They are (a) the right to possession of his property until damages have been finally assessed and paid, (b) the right to consequential damages for diminution in value of any part of the tract not taken, (c) the right to damages without deduction of benefits accruing from the construction of the railroad, (d) the right to attorneys' fees and expenses in addition to damages, (e) the right to trial by jury, and (f) the right to review by appeal instead of by certiorari. Other differences are of less importance.

All questions of the propriety, under the state constitution and laws, of condemning plaintiff's land in the pending proceeding, rather than under the Railroad Condemnation Law, have been resolved in respondent's favor by the Michigan Supreme Court in other suits, which involved lands taken for the same project under the same contract and by like procedure. *Fitzsimons & Galvin, Inc.* v. *Rogers,* 243 Mich. 649; *Johnstone* v. *Detroit, Grand Haven & Milwaukee Ry. Co.,* 245 Mich. 65. Accepting this interpretation of the local law by the highest court of the State, *Rindge Co.* v. *Los Angeles Co.,* 262 U. S. 700, 708, we restrict our inquiry to the questions raised under the Federal Constitution.

The appellant contends that the taking of his land for the purpose of exchange with the railway company is for a private and not a public purpose (see *Missouri Pacific Ry.* v. *Nebraska,* 164 U. S. 403, 417,) and that the statute which authorizes the condemnation of his property by a proceeding under the Highway Act, when it is to be devoted to railway use, deprives him of the special advan-

tages named which are accorded to land owners whose property is taken under the Railway Condemnation Statutes, and so denies to him due process of law and the equal protection of the laws.

We need not inquire whether, under the peculiar provisions of the Michigan statutes, the proposed taking of appellant's land is for highway or railway purposes. It is enough that although the land is to be used as a right of way for a railroad, its acquisition is so essentially a part of the project for improving a public highway as to be for a public use. See *Brown* v. *United States,* 263 U. S. 78; *Pitznogle* v. *Western Md. R. R. Co.,* 119 Md. 673; *Rogers* v. *Bradshaw,* 20 John. 735. Nor is the requirement of the Highway Act that the appellant surrender possession of the property before payment of compensation, in itself, a denial of due process, so long as the payment of the award is insured, which is not questioned here. Sec. 20, Act No. 352 of 1925 as amended. *Backus* v. *Ft. Street Union Depot Co.,* 169 U. S. 557, 568; *Joslin Mfg. Co.* v. *City of Providence,* 262 U. S. 668; *Rindge Co.* v. *Los Angeles Co., supra.* In other respects the advantages of proceeding under the Railway Condemnation Act, alleged to be withheld from appellant, fall into two classes, those which affect the measure of his recovery and those which relate to details of procedure.

The right to just compensation to which appellant is entitled under the due process clause, without regard to the particular procedure employed, is guaranteed both by the Fourteenth Amendment and Art. 13 of the Michigan constitution. We cannot assume that under the procedure prescribed by the state for the taking of appellant's land he will not be entitled to receive or will in fact be denied the just compensation which the Constitution guarantees.

On the contrary, the Supreme Court of Michigan has explicitly pointed out that the procedure and statutes

presently involved not only insure just compensation in the constitutional sense but allow the full measure of compensation, for the taking, provided by the Railway Act. In addition, it is emphasized that even though the land be taken under the Highway Act, that Act, like the Railway Act, does not permit the offset of benefits arising from railroad construction against damages for the taking, since it only permits deduction of benefits derived from the construction of a highway. *Fitzsimons & Galvin Co., Inc.* v. *Rogers, supra,* 664,[1] see *Johnstone, et al.* v.

[1] "It is true that the highway law of this State provides that in fixing compensation the benefits accruing to the property owner are offset against the damage awarded. See Act No. 352, Pub. Acts 1925, § 18; *In re Macomb County Board of County Road Com'rs,* 242 Mich. 239. But it does not follow from this that in a proceeding wherein the State highway commissioner is seeking to secure a right of way, the damage to be awarded the property owner will be anything short of the 'just compensation' provided in section 2 of Art. 13 of the Constitution. In the present case, as in an ordinary proceeding for condemning a right of way for a railroad, it will be the duty of the commissioners 'to compensate the owner for what his landed interest will suffer from the use proposed to be made of it by the railroad company.' *Barnes* v. *Railway Co.,* 65 Mich. 251. Adequate compensation is such only as puts the injured party in as good condition as he would have been in if the injury had not been inflicted. It includes the value of the land, or the amount to which the value of the property from which it is taken is depreciated. *Grand Rapids, etc. R. Co.* v. *Heisel,* 47 Mich. 393. There is no provision in our statutes for offsetting benefits against damages incident to taking land for a railroad right of way; and in the absence of an express statutory provision such a deduction cannot be made. *Detroit, etc. R. Co.* v. *National Bank,* 196 Mich. 660; *State Highway Commissioner* v. *Breisacher,* 231 Mich. 317. With this construction placed upon the highway act, it is not subject to the objection that it fails to provide adequate compensation for the property owner and is therefore unconstitutional. Nor does it leave force to plaintiff's contention that since it is here sought to condemn a railroad right of way the procedure must be under and in accordance with the general railroad act rather than under the highway law." Per North, J., *Fitzsimons & Galvin, Inc.* v. *Rogers,* 243 Mich. 649, 664, 665.

Detroit, Grand Haven & Milwaukee Ry. Co., supra, 68; *In re Widening of Bagley Avenue,* 248 Mich. 1; *In re Widening of Fulton Street,* 248 Mich. 213.

As thus construed the Michigan statutes afford no basis for anticipating that, in the pending proceeding, just compensation will be denied, or that any advantages given by the provisions of the Railway Act with respect to the amount of compensation for the land taken or the deduction of benefits will be withheld from appellant. Hence it is unnecessary to say, in response to the contention pressed upon us, how far these advantages if not secured to appellant by the Highway Act or embraced within just compensation are conferred upon him by constitutional guaranties. See *McCoy* v. *Union Elevator Railroad Co.,* 247 U. S. 354; *Bauman* v. *Ross,* 167 U. S. 548.

Attorneys' fees and expenses are not embraced within just compensation for land taken by eminent domain. See *Joslin Mfg. Co.* v. *City of Providence, supra,* 675. A state may allow the recovery of an attorney's fee in special classes of proceedings while withholding them in others. *People of Sioux City* v. *National Surety Co.,* 276 U. S. 232, 234; *C. & N. W. Ry.* v. *Nye, etc. Co.,* 260 U. S. 35; *Missouri, Kansas & Texas Ry.* v. *Cade,* 233 U. S. 642; *Farmers, etc. Ins. Co.* v. *Dobney,* 189 U. S. 301. In condemnation proceedings it may classify those whose property is taken and allow the one class expenses not granted to another. *Joslin Mfg. Co.* v. *City of Providence, supra,* 675. Since a permitted classification of those upon whom liability for attorneys' fees is imposed involves the denial of their recovery to some, appellant cannot object here to a classification allowing attorneys' fees in condemnation proceedings brought by railroad companies and denying them when brought by the state. If the classification is valid he cannot complain, if invalid,

the fees denied to him under the Highway Act could not have been recovered under the Railway Act.

The due process clause does not guarantee to the citizen of a state any particular form or method of state procedure. Under it he may neither claim a right to trial by jury nor a right of appeal. Its requirements are satisfied if he has reasonable notice and reasonable opportunity to be heard and to present his claim or defense, due regard being had to the nature of the proceeding and the character of the rights which may be affected by it. *Reetz* v. *Michigan,* 188 U. S. 505, 508; *Hurwitz* v. *North,* 271 U. S. 40; *Bauman* v. *Ross,* 167 U. S. 548, 593; *Backus* v. *Union Depot Co., supra,* p. 569.

Nor does the equal protection clause exact uniformity of procedure. The legislature may classify litigation and adopt one type of procedure for one class and a different type for another. That condemnation proceedings under the Highway Act are conducted on behalf of the State is in itself sufficient basis for the exercise of the legislative judgment in providing for it a different procedure from that prescribed for the exercise of eminent domain by a private corporation. See *Backus* v. *Union Depot Co., supra,* p. 570.

The decree dismissing the appellant's bill was attested by only one of the three judges who heard the case. The appellant contends that it "does not purport to be authorized or sanctioned" by either of the other two judges. The decree on its face purports to be by the District Court sitting in the cause. It recites in terms that "the court, . . . being fully advised in the premises, do now here order, adjudge and decree . . ." and the record shows that the court referred to was made up of three judges, required by § 266. Even if, as appellant assumes, this statement by one judge is not to be relied upon, there is ample authorization and sanction for the decree in the

opinion signed by two of the judges and the concurring opinion of the third. This we think equivalent for that purpose to an announcement in open court, three judges sitting. See *Cumberland Telephone & Telegraph Co.* v. *Louisiana Public Service Commission,* 260 U. S. 212, 218.

We have considered, but do not discuss, other contentions of appellant of less moment.

Affirmed.

COCHRAN ET AL. *v.* LOUISIANA STATE BOARD OF EDUCATION ET AL.

APPEAL FROM THE SUPREME COURT OF LOUISIANA.

No. 468. Argued April 15, 1930.—Decided April 28, 1930.

Appropriation by the State of money derived from taxation to the supplying of school books free for children in private as well as public schools is not objectionable under the Fourteenth Amendment as a taking of private property for private purposes where the books furnished for private schools are not granted to the schools themselves but only to or for the use of the children, and are the same as those furnished for public schools and are not religious or sectarian in character. P. 374.

168 La. 1030, affirmed.

APPEAL from a decree of the Supreme Court of Louisiana affirming the refusal of a trial court to issue an injunction to restrain the State Board of Education and certain officials, appellees herein, from expending tax funds for the purchase of free school books.

Mr. Challen B. Ellis, with whom *Messrs. Wade H. Ellis, Daniel C. Roper, W. D. Jamieson, Herbert S. Ward, James U. Galloway,* and *Nash Johnson* were on the brief, for appellants.

Taxes levied by a State must be for a public purpose. *Parkersburg* v. *Brown,* 106 U. S. 487; *Cole* v. *LaGrange,*

113 U. S. 1; *Dodge* v. *Mission Township,* 107 Fed. 827; *Beach* v. *Bradstreet,* 85 Conn. 344.

The test to be applied is whether the public has a common and equal right to the use and benefit. *Cole* v. *La-Grange, supra; Missouri Pac. R. Co.* v. *Nebraska,* 164 U. S. 403; *Connecticut College* v. *Calvert,* 87 Conn. 421; *Jenkins* v. *Andover,* 103 Mass. 94; *Curtis* v. *Whipple,* 24 Wis. 350; *Savings & Loan Ass'n* v. *Topeka,* 20 Wall. 655; *Opinion of the Justices,* 211 Mass. 624.

Private schools do not come under the category of public use. Cases *supra; Atchison, T. & S. F. R. Co.* v. *Atchison,* 47 Kan. 712; *Opinion of the Justices,* 214 Mass. 599; *Lowell* v. *Boston,* 111 Mass. 454.

The principle derived from these cases is that a use which is denominated a "public use," as justifying the taking of private property under either the taxing power or the power of eminent domain, requires a right secured to the public to enjoy the objects for which the tax is levied upon such terms as the public itself may lay down, and the control of which the public has reserved even after the aid has passed to the object to which it is granted.

A private school may limit its patrons in any manner that it chooses. It may limit them to persons of the Ethiopian race; or to persons of Japanese extraction; or to persons in a certain district; or to persons of a certain degree of birth; or to persons of a certain sect; or to a limited number of persons such as ten or five; and the State cannot restrain such action. The right of control by the State over private schools is greatly restricted (*Meyer* v. *Nebraska,* 262 U. S. 390); the State has little or no control or supervision over the instruction or instructors in private schools—an essential element in *Jenkins* v. *Andover,* 103 Mass. 94.

The furnishing of text-books free by the State to school children attending private schools which charge tuition

and require the children to furnish their school books, is an aid to such private institutions by furnishing a part of their equipment. If the legislature may not levy a tax for the aid of private schools, it may not indirectly do the same thing. *Underwood* v. *Wood,* 93 Ky. 177; *Smith* v. *Donahue,* 195 N. Y. S. 202, 202 App. Div. 656; *Dakota Synod* v. *State,* 2 S. D. 366; *Williams* v. *Stanton School District,* 173 Ky. 708.

If the furnishing of text-books free to children attending private schools is not considered an aid to such private schools, but as incidental to the state educational system, then it logically follows that the tuition of the children attending such schools could be paid; their transportation to and from such schools could be provided; the salaries of the instructors could be paid in part or in whole; and finally, the buildings themselves could be erected,—with state funds; all of which, under the reasoning evinced in the statutes of Louisiana, might be justified on the ground that it is the interest of the State to see that its youth are educated.

If the furnishing of school books to children attending private schools is not to be considered an aid to such private schools but an aid only to the children attending such schools, then the tax levied for such purpose is equally obnoxious to the Federal Constitution because it constitutes a diversion of public property to private individuals without distinction as to need for charity and without any special obligation of the State, charitable or otherwise, to such persons. *Savings & Loan Ass'n* v. *Topeka,* 20 Wall. 655; *State* v. *Switzler,* 143 Mo. 287; *Beach* v. *Bradstreet,* 85 Conn. 344.

If the principle upon which there is allowed a diversion of the public school funds for the benefit of private individuals, is sanctioned, then the division of the public schools funds may be permitted, so that ultimately those whose children attend private schools, under the simula-

tion of bearing the burden of taxation for the public schools, are paying for the maintenance only of their own private schools. This finally means, in effect, depriving the State of its power to tax (for the support of the public schools) those who support only their private schools—and practically the destruction of one of the free institutions under our republican form of government.

The distinction between the case here and those affirming the constitutional authority of the State to aid railroads or to engage in private enterprises serving the public (*Green* v. *Frazier,* 253 U. S. 233) is that in the latter cases there is secured to the public both public control and common and equal right of use. *Savings & Loan Ass'n* v. *Topeka,* 20 Wall. 655; *Green* v. *Frazier,* 253 U. S. 233; *Connecticut College* v. *Calvert,* 87 Conn. 421; *Curtis* v. *Whipple,* 24 Wis. 350; *Jenkins* v. *Andover,* 103 Mass. 94.

Messrs. Percy Saint, Attorney General of Louisiana, *Peyton R. Sandoz,* Assistant Attorney General, *H. H. White* and *Walter J. Burke* were on the brief for appellees.

Mr. Chief Justice Hughes delivered the opinion of the Court.

The appellants, as citizens and taxpayers of the State of Louisiana, brought this suit to restrain the State Board of Education and other state officials from expending any part of the severance tax fund in purchasing school books and in supplying them free of cost to the school children of the State, under Acts No. 100 and No. 143 of 1928, upon the ground that the legislation violated specified provisions of the constitution of the State and also section 4 of Article IV and the Fourteenth Amendment of the Federal Constitution. The Supreme Court of the State affirmed the judgment of the trial court, which refused to issue an injunction. 168 La. 1030.

Act No. 100 of 1928 provided that the severance tax fund of the State, after allowing funds and appropriations as required by the state constitution, should be devoted "first, to supplying school books to the school children of the State." The Board of Education was directed to provide "school books for school children free of cost to such children." Act No. 143 of 1928 made appropriations in accordance with the above provisions.

The Supreme Court of the State, following its decision in *Borden* v. *Louisiana State Board of Education,* 168 La. 1005, held that these acts were not repugnant to either the state or the Federal Constitution.

No substantial Federal question is presented under section 4 of Article IV of the Federal Constitution guaranteeing to every State a republican form of government, as questions arising under this provision are political, not judicial, in character. *State of Ohio ex rel. Bryant* v. *Akron Metropolitan Park District, ante,* p. 74, and cases there cited.

The contention of the appellant under the Fourteenth Amendment is that taxation for the purchase of school books constituted a taking of private property for a private purpose. *Loan Association* v. *Topeka,* 20 Wall. 655. The purpose is said to be to aid private, religious, sectarian, and other schools not embraced in the public educational system of the State by furnishing text-books free to the children attending such private schools. The operation and effect of the legislation in question were described by the Supreme Court of the State as follows (168 La., p. 1020):

"One may scan the acts in vain to ascertain where any money is appropriated for the purchase of school books for the use of any church, private, sectarian or even public school. The appropriations were made for the specific purpose of purchasing school books for the use of the school children of the state, free of cost to them. It was

for their benefit and the resulting benefit to the state that the appropriations were made. True, these children attend some school, public or private, the latter, sectarian or non-sectarian, and that the books are to be furnished them for their use, free of cost, whichever they attend. The schools, however, are not the beneficiaries of these appropriations. They obtain nothing from them, nor are they relieved of a single obligation, because of them. The school children and the state alone are the beneficiaries. It is also true that the sectarian schools, which some of the children attend, instruct their pupils in religion, and books are used for that purpose, but one may search diligently the acts, though without result, in an effort to find anything to the effect that it is the purpose of the state to furnish religious books for the use of such children. . . . What the statutes contemplate is that the same books that are furnished children attending public schools shall be furnished children attending private schools. This is the only practical way of interpreting and executing the statutes, and this is what the state board of education is doing. Among these books, naturally, none is to be expected, adapted to religious instruction."

The Court also stated, although the point is not of importance in relation to the Federal question, that it was "only the use of the books that is granted to the children, or, in other words, the books are lent to them."

Viewing the statute as having the effect thus attributed to it, we can not doubt that the taxing power of the State is exerted for a public purpose. The legislation does not segregate private schools, or their pupils, as its beneficiaries or attempt to interfere with any matters of exclusively private concern. Its interest is education, broadly; its method, comprehensive. Individual interests are aided only as the common interest is safeguarded.

Judgment affirmed.

CORLISS *v.* BOWERS, COLLECTOR OF INTERNAL REVENUE.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 344. Argued April 15, 16, 1930.—Decided April 28, 1930.

1. Taxation is not so much concerned with the refinements of title as it is with actual command over the property taxed, the actual benefit for which the tax is paid. P. 378.
2. The income that is subject to a man's unfettered command and that he is free to enjoy at his own option may be taxed to him as his income, whether he sees fit to enjoy it or not. P. 378.
3. Under § 219, (g), (h), of the Revenue Act of 1924, the income from a fund that has been transferred to trustees, in trust to pay the income to the donor's wife for life with remainder over to their children, is to be included in computing his net income if he has reserved the power to alter or abolish the trust at will; and this applies to income actually paid over to the wife in the tax year. P. 377.

34 F. (2d) 656, affirmed.

CERTIORARI, 280 U. S. 543, to review a judgment of the Circuit Court of Appeals which affirmed the District Court, 30 F. (2d) 135, in dismissing an action to recover money paid as income taxes.

Mr. Joseph M. Hartfield, with whom *Messrs. Russell D. Morrill* and *A. C. Newlin* were on the brief, for petitioner.

Solicitor General Hughes, with whom *Assistant Attorney General Youngquist, Messrs. Sewall Key* and *J. Louis Monarch,* Special Assistants to the Attorney General, *Clarence M. Charest,* General Counsel, and *Frederick W. Dewart,* Special Attorney, Bureau of Internal Revenue, were on the brief, for respondent.

Messrs. Marcel E. Cerf, B. E. Witkin, and *Henry Robinson* filed a brief as *amici curiae,* by special leave of Court.

MR. JUSTICE HOLMES delivered the opinion of the Court.

This is a suit to recover the amount of an income tax paid by the plaintiff, the petitioner, under the Revenue Act of 1924, June 2, 1924, c. 234, § 219, (g) (h), 43 Stat. 253, 277. (U. S. C., Tit. 26, § 960.) The complaint was dismissed by the District Court, 30 F. (2d) 135, and the judgment was affirmed by the Circuit Court of Appeals, 34 F. (2d) 656. A writ of certiorari was granted by this Court.

The question raised by the petitioner is whether the above section of the Revenue Act can be applied constitutionally to him upon the following facts. In 1922 he transferred the fund from which arose the income in respect of which the petitioner was taxed, to trustees, in trust to pay the income to his wife for life with remainder over to their children. By the instrument creating the trust the petitioner reserved power "to modify or alter in any manner, or revoke in whole or in part, this indenture and the trusts then existing, and the estates and interests in property hereby created" &c. It is not necessary to quote more words because there can be no doubt that the petitioner fully reserved the power at any moment to abolish or change the trust at his will. The statute referred to provides that "when the grantor of a trust has, at any time during the taxable year, . . . the power to revest in himself title to any part of the corpus of the trust, then the income of such part of the trust for such taxable year shall be included in computing the net income of the grantor." § 219 (g) with other similar provisions as to income in § 219 (h). There can be no doubt either that the statute purports to tax the plaintiff in this case. But the net income for 1924 was paid over to the petitioner's wife and the petitioner's argument is that however it might have been in different circumstances

the income never was his and he cannot be taxed for it. The legal estate was in the trustee and the equitable interest in the wife.

But taxation is not so much concerned with the refinements of title as it is with actual command over the property taxed—the actual benefit for which the tax is paid. If a man directed his bank to pay over income as received to a servant or friend, until further orders, no one would doubt that he could be taxed upon the amounts so paid. It is answered that in that case he would have a title, whereas here he did not. But from the point of view of taxation there would be no difference. The title would merely mean a right to stop the payment before it took place. The same right existed here although it is not called a title but is called a power. The acquisition by the wife of the income became complete only when the plaintiff failed to exercise the power that he reserved. *Saltonstall* v. *Saltonstall,* 276 U. S. 260, 271. *Chase National Bank* v. *United States,* 278 U. S. 327. *Reinecke* v. *Northern Trust Co.,* 278 U. S. 339. Still speaking with reference to taxation, if a man disposes of a fund in such a way that another is allowed to enjoy the income which it is in the power of the first to appropriate it does not matter whether the permission is given by assent or by failure to express dissent. The income that is subject to a man's unfettered command and that he is free to enjoy at his own option may be taxed to him as his income, whether he sees fit to enjoy it or not. We consider the case too clear to need help from the local law of New York or from arguments based on the power of Congress to prevent escape from taxes or surtaxes by devices that easily might be applied to that end.

Judgment affirmed.

The CHIEF JUSTICE took no part in this case.

ESCHER, ANCILLARY ADMINISTRATOR, ET AL. *v.* WOODS, TREASURER OF THE UNITED STATES, ET AL.

CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 365. Argued April 17, 1930.—Decided April 28, 1930.

Upon recovery by citizens of a neutral country of the value of property mistakenly seized during the late war as belonging to an alien enemy, the Alien Property Custodian is not entitled to a deduction for administration expenses not shown to have been incurred in respect of the particular property or fund. P. 383.

33 F. (2d) 556, reversed.

CERTIORARI, 280 U. S. 544, to review a judgment of the Court of Appeals of the District of Columbia reversing a judgment of the Supreme Court of the District in a suit against the Alien Property Custodian.

Mr. Spier Whitaker, with whom *Messrs. Lawrence A. Baker, Lyttleton Fox, Henry Escher,* and *Henry Ravenel* were on the brief, for petitioners.

The Alien Property Custodian was not given, and constitutionally could not be given, the right to appropriate from the money of petitioners as so-called administrative expenses the sum of $55,909.83, or any part of it, and therefore the judgment of the Court of Appeals should be reversed and the decree of the Supreme Court of the District of Columbia affirmed because:

A. The provisions of the Trading with the Enemy Act expressly limit the deductions for expenses to the amounts actually and necessarily incurred on account of the particular money and property from which the deduction is sought to be made; and

B. Even if this would include any part of the salaries and other general expenses of operating the Custodian's office—which we deny—the provisions of the Fifth

Amendment do not permit the Custodian to appropriate under the guise of expenses any percentage of petitioners' money and property, much less a percentage arbitrarily fixed by him without notice to the owner; and

C. The bringing of petitioners' suit under § 9 of the Trading with the Enemy Act necessarily restricted the right and power of the Treasurer and the Custodian over the money and property sued for to the mere holding of it until termination of the suit; and, any provision of the statute to the contrary notwithstanding, the utmost that the Custodian can charge against petitioners upon accounting under the decree in their favor is the actual amount, if any, necessarily expended for protecting and taking care of their money and property; and

D. The respondents having deducted the full amount of all expenses directly attributable to the money and property of petitioners and having admitted that it is impossible to determine the actual amount of the Custodian's general expenses which were incurred in respect of petitioners' money and property, the Custodian has no right to deduct and withhold any additional amount whatsoever on account of his so-called "administrative expenses."

Assistant Attorney General Rugg, with whom *Attorney General Mitchell, Messrs. Claude R. Branch* and *Thomas E. Rhodes* and *Mary G. Connor,* Special Assistants to the Attorney General, and *Mr. J. Frank Staley* were on the brief, for respondents.

I. The Act of March 4, 1923, specifically provided that the Custodian might pay the necessary expenses incurred by him in securing the possession, collection, or control of money or other property seized by him or in protecting or administering the same, out of funds seized by the Custodian. This Court has held that the Custodian was authorized to seize property supposed to belong to an enemy even before an adjudication that it was enemy

property, and has recognized that all property seized by the Custodian should be administered by him.

The Act of March 28, 1918, vests the Custodian with all the powers of a common law trustee in respect of all property seized by him. Congress intended that the entire cost of administering the office should be borne by the trust funds administered by him. The practice of deducting for administrative expenses a fixed percentage of the trust funds upon their return to the owners had been in force for several years before the passage of the Act of March 4, 1923, and that Act operated as a confirmation of the existing practice.

Moreover, it is universally recognized that a trustee has the right to be reimbursed for the expenses incurred in the administration of the trust estate. This Court has said that proper charges and expenses may be deducted even from property wrongfully seized.

II. The deduction of a flat rate charge of two per cent. has been determined by the Custodian to be the lowest amount necessary to cover the expenses incurred by him in collecting, protecting, and administering the seized property.

The principal of the trust estate of the petitioners amounted to over $3,000,000, and the estate was administered by the Custodian for over ten years. The amount deducted is about two per cent. of the principal sum returned, and is about five per cent. of the total income.

The petitioners admit that the Custodian could deduct exact amounts expended in the administration of their property, but contend that they should not be charged "one cent more than the actual expense of protecting or administering such property" or anything on account of the general expenses of the Custodian's office. If deductions can not be made for this purpose, it is obvious that the authority given to the Custodian to pay

expenses from trust funds will be largely ineffective. It was unavoidable that the Custodian should make mistakes and seize the property of non-enemies.

The action of the Custodian in determining this method and amount is presumed to be reasonable and proper.

III. The deduction by the Custodian of a fixed percentage to cover administrative costs or expenses did not deprive the petitioners of their property without due process of law. The Trading with the Enemy Act was passed under Art. I, § 8, Cl. 11 of the Constitution empowering Congress to declare war and make rules concerning captures on land and water. The power vested in the President to make rules and regulations with respect to the administration of property seized by the Custodian included the power to regulate the administrative expenses to be deducted from seized property.

Therefore, the method employed by the Executive Department of deducting a flat rate of two per cent. from the petitioners' seized property was the exercise of the discretionary power vested in the President, which is not reviewable. The power conferred by the Act to take enemy-owned property included the authority to seize property believed to belong to an enemy. This Act, and its amendments and the Executive Orders of the President, authorized the Custodian to make the deductions in question, as stated above. The Fifth Amendment does not prevent the exercise of war powers, and the Executive must have wide discretion as to the means to be employed in order to carry out the war successfully.

Moreover, it is not open to the petitioners to raise any constitutional question, as none was raised in the record in the courts below.

MR. JUSTICE HOLMES delivered the opinion of the Court.

This is a suit by citizens of Switzerland to recover property mistakenly seized during the late war as belonging

to an alien enemy. The plaintiffs recovered, but on a statement of account by the Alien Property Custodian he claimed a deduction of $55,909.83 for administrative expenses, "said sum having been paid by [him] into a fund maintained by him, out of which the expenses incurred in administering money and other property seized by the Alien Property Custodian, are paid." On a rule to show cause the claim was disallowed by the Supreme Court of the District of Columbia, but the decision was reversed by the Court of Appeals. 33 F. (2d) 556. A writ of certiorari was granted by this Court.

In the answer to the motion to show cause why the charge should not be stricken out it was not alleged and no evidence was offered to show that the expenses actually incurred in respect of the particular fund were equal to this sum, or what, if any, they were. It was said to be impracticable to prove them or to apportion the general expenses of the office. The amount was two per cent. of the assets handed over and it is said that without pleading or evidence the record shows this to be a reasonable charge.

To sustain the deduction the respondents rely upon the Trading with the Enemy Act of October 6, 1917, c. 106, § 12; 40 Stat. 411, 423, amended by Act of March 28, 1918, c. 28; 40 Stat. 459, 460, by which the Alien Property Custodian is "vested with all the powers of a common-law trustee" in respect of all property, "other than money," received by him under the Act and may exercise any powers appurtenant thereto "as though he were the absolute owner thereof." They also invoke Executive Order, February 26, 1918 (No. 2813) that the Custodian "may pay all reasonable and proper expenses which may be incurred in or about securing possession or control of money or other property . . . and in otherwise protecting and administering the same. So far as may be, all such expenses shall be paid out of, and in any event

recorded as a charge against, the estate to which such money or other property belongs." Also Order of July 16, 1918 (No. 2916), of which it is necessary to mention only the direction that the expenses "shall be limited to and paid or satisfied out of only the property or business or undertaking involved and out of which" the expenses shall have arisen provided that if the property or assets of the business are insufficient, they may be satisfied out of other property "received from, or as the property of, the same enemy." Under these Acts and Orders the Custodian has adopted the course followed in this case and it is further urged that his conduct is tacitly ratified by the later Acts of March 4, 1923, c. 285, adding § 24 to the original Act, which embodies so much of the above orders as limits the liability to expenses incurred in respect of the same property, and to the property concerned or other property of the same person, 42 Stat. 1511, 1516; and May 16, 1928, c. 580; 45 Stat. 573, 574, that "all expenses of the office . . . including compensation of the Alien Property Custodian . . . shall be paid from interest and collections on trust funds and other properties under the control of such Custodian." It will be observed that the charge for the expenses of the office is upon interest and collections only; that is, a deduction from income for the cost of earning it, not as in the present case, a charge upon the corpus of the fund.

We do not perceive even in 1928 anything that clearly suggests treating the property in the hands of the Custodian as one great trust, to be called on to bear the expenses of administration, as one homogeneous whole. On the contrary the directions are explicit that the expenses charged to a given property are those incurred in getting or protecting it, or at least others similarly due from the same owner. But, and this is the main thing, all of these provisions naturally are interpreted to refer to property that the Custodian is entitled to hold. It

would be extraordinary if the charges incident to a seizure that the law did not intend the Custodian to make and a possession that the law requires him to surrender, were to be imposed upon the owner whose interests were sacrificed up to the moment of restitution. It seems to be going far enough to require him to bear the loss that he has suffered, without compelling him to pay the Government for its outlay in doing him harm. See *Hobbs* v. *McLean,* 117 U. S. 567, 582.

Decree reversed.

CHESAPEAKE & POTOMAC TELEPHONE COMPANY *v.* UNITED STATES.

CERTIORARI TO THE COURT OF CLAIMS.

No. 389. Argued April 21, 22, 1930.—Decided May 5, 1930.

A telephone company, while under a standing written contract, made with the Secretary of the Treasury pursuant to the Act of June 17, 1910, to furnish telephone equipment and service to the War Department, installed in a building especially constructed for it by the Government, an unusually large and very expensive switch-board to meet the growing needs of the Department during the World War; and after the need was over and the switch-board had been removed, it sued under the Dent Act to recover the cost of installation less salvage. *Held,* upon the facts as found below:

1. That the switch-board was covered by the written contract, and that the conduct of the parties following installation was consistent with this view. P. 386.

2. That a contract for extra pay was not to be implied either (a) from claims addressed to officials of the Department having no authority to bind the Government and not assented to by them or known to their superiors; or (b) from the fact that the plans for the special building, showing the switch-board and equipment proposed, were submitted to the Secretary of War; or (c) from the fact that the Government had continued to use the switch-board after the claims were made. P. 388.

68 Ct. Cls. 273, affirmed.

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CERTIORARI, 280 U. S. 548, to review a judgment of the Court of Claims, dismissing a petition to recover additional compensation upon a contract said to be implied in fact.

Mr. Stanton C. Peelle, with whom *Messrs. C. F. R. Ogilby, Paul E. Lesh, Dale D. Drain,* and *Jerome F. Barnard* were on the brief, for petitioner.

Assistant Attorney General Richardson, with whom *Attorney General Mitchell, Assistant Attorney General Rugg,* and *Messrs. Claude R. Branch,* Special Assistant to the Attorney General, and *Heber H. Rice* were on the brief, for the United States.

MR. JUSTICE HOLMES delivered the opinion of the Court.

This is a suit under the Dent Act, March 2, 1919, c. 94, 40 Stat. 1272, to recover upon a contract said to be implied in fact, to pay the cost of installing a very large telephone switchboard for the War Department during the late war, less the amounts realized from the parts when the switchboard was removed. The Court of Claims dismissed the petition, and a writ of certiorari was granted by this Court.

The decision of the Court of Claims went upon the ground that the installation was covered by a written contract between the plaintiff and the Secretary of the Treasury, (Act of June 17, 1910, c. 297; 36 Stat. 468, 531; U. S. Code, Tit. 41, § 7,) and that there was no subsequent contract enlarging the obligation of the Government; it being expressly found that the only persons to whom any suggestion was made that additional pay was expected had no authority to bind the Government, *Jacob Reed's Sons* v. *United States,* 273 U. S. 200, 202; *Baltimore & Ohio R. R. Co.* v. *United States,* 261 U. S. 592, 596, and that the Secretary of War never heard the suggestion or knew that a claim would be made until after the

armistice. We are of opinion that on the findings the decision was right.

The contract in force when the work was completed, June 22, 1918, bound the Telephone Company to "install, equip, and maintain such telephone equipment as may be required in the District of Columbia, and furnish service in connection therewith" at rates set forth, one item being "common battery private branch exchange switchboards, including one operator's set of telephones for each operator's position, each, per annum, $24.00." Although it is argued that neither the Act of June 17, 1910, c. 297, nor the contract covered this unusually large switchboard, we think it too plain for discussion that the words used, taken literally, covered it in terms. The only suggestion that needs a short answer is that this work was so wholly outside anything that was contemplated that a special agreement was necessary or at least just. But war had been approaching and large additions had been made without question until after war was declared, April 6, 1917. A little later the present structure was placed in a separate building erected for it by the United States. The understanding of the parties is shown by the fact that a contract with similar terms was made for the next year on September 25, 1918. The plaintiff sent in and was paid bills for rental at the old rate, for increased rates for the lines and stations, and other unquestioned bills, without any attempt to charge for the expenses of the new structure. The explanation of the slight charges for rentals is simple and makes the whole business clear. The settled policy of the Company was to rely for its chief revenue on mileage charges upon station lines, charges for telephone stations, and local messages. Had the war gone on another year probably it would have made a good deal of money. The American Telegraph and Telephone Company regarded the problem of increased telephone service at the War Department as largely its own, and in fact

has more than reimbursed the plaintiff for its loss. When the plaintiff's district manager told his superior officer that the installation ought to be held up until they got a written order, he was told that they wanted to do everything possible for the Government and would take their chances of getting paid.

There is nothing upon which the Company can found a claim except that in January, 1918, it advised the person who was in charge of the telephone service of the War Department, but whose salary the plaintiff paid, and another under whose general direction the service was, that it expected the Government to pay the cost of the new switchboard, less salvage. There was no assent to this expectation, nor did these officers have any authority to give such assent, and as we have said there was neither assent nor knowledge on the part of those higher up. The fact that plans of the building to be erected by the Government showing the switchboard and equipment proposed were submitted to the Secretary of War is no help to the plaintiff. Of course they were, whichever was to pay the bills. Neither was the continued use of the structure after the plaintiff had made its claims. The Government had to use it, and had the right to use it, whether the Government was bound to pay, or whether, as the plaintiff's engineer said to its district manager, the Telephone Company took the chances of getting paid. The Government had the plaintiff's contract and would have had the right to rely upon it even if it had been informed that the plaintiff was dissatisfied. It seems to us that the dissent of two of the Judges of the Court below is directed rather to the findings than to the statement of the law upon the findings as they stand. These are not open to question before us.

Judgment affirmed.

MR. JUSTICE STONE took no part in the consideration or decision of this case.

DANOVITZ, SURVIVING PARTNER OF FEITLER BOTTLE COMPANY, *v.* UNITED STATES.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

No. 424. Argued April 23, 1930.—Decided May 5, 1930.

1. Upon review of a judgment forfeiting contraband property under § 25, Title II of the Prohibition Act, the sufficiency and effect of the evidence are not open if the trial was to the judge without written waiver of a jury. P. 396.
2. The word "manufacture" may be used to express the whole process by which an article is made ready for sale on the open market. *Id.*
3. The purpose of the Prohibition Act was to suppress the entire traffic that it condemns, and it should be liberally construed to that end. P. 397.
4. Decisions under the revenue acts have little weight as against legislation under the 18th Amendment. *Id.*
5. Empty barrels and bottles, corks, labels and cartons offered for sale in such mode as purposely to attract purchasers who want them for the unlawful "manufacture" of intoxicating liquor for sale are designed for that manufacture within the meaning of § 25, Title II of the Prohibition Act, and are subject to seizure and forfeiture. *Id.*

34 F. (2d) 30, affirmed.

CERTIORARI, 280 U. S. 548, to review a decision of the Circuit Court of Appeals affirming a decree of forfeiture under the Prohibition Act.

Mr. Ward Bonsall, with whom *Messrs. John S. Pyle* and *John W. Dunkle* were on the brief, for petitioner.

Practically every article included in the libel in this case comes within the term *empty containers,* being such articles as empty barrels, empty bottles and corks, cartons, paper wrappers, paper bags, caps for bottles, labels, wrapping paper, empty jugs, empty demijohns, empty cans, cardboard, sealing wire, twine and cardboard cases, together with such utensils as are used in bottling, as dis-

tinguished from producing or manufacturing, such as siphons and filters, crimping machines and labeling machines.

The act or process of the manufacture of liquor is complete with its production and placing in the receiving tub, tank or cistern. The placing of the liquor in barrels, bottles, casks or kegs comes later, and is always separated from the manufacturing process by a greater or less but necessarily appreciable period of time.

When the National Prohibition Act was passed the distinction herein made was already in the laws of the United States and had been there for two generations. §§ 3247, 3267, Rev. Stats.

With such provisions showing that the process of "manufacture" ended with production, and did not include placing in containers, it is not to be supposed that the word "manufacture" would have any different meaning when used in the National Prohibition Act.

This case, begun by a seizure on May 10, 1928, was the first case of the kind in the United States, so far as counsel knows, and in spite of the fact that large numbers of barrel and bottle dealers, in every city in the country, have sold their goods continuously, both before and since the Eighteenth Amendment and the National Prohibition Act went into effect, to whatever purchasers presented themselves, undoubtedly to bootleggers among others, in exactly the same manner as the Feitler Bottle Company may have done.

As used in § 25, the term "property designed for the manufacture of liquor intended for use in violating this chapter" has a dual meaning, as follows:

(a) The property must be usable in the process of making liquor.

(b) The property must be intended by the owner to be so used by himself. *Kohler Co.* v. *United States*, 33 F.

(2d) 225, certiorari denied, 280 U. S. 598; *Street* v. *Lincoln Safe D. Co.*, 254 U. S. 88.

The Court of Appeals in this case did exactly what this Court, in the *Street* case, said should not be done, namely, by "inference and construction" they convinced themselves that Congress had expressed an intention to confiscate empty containers, and they did this by extending and enlarging provisions of law "which have ample field for other operation in effecting a purpose clearly indicated and declared." Cf. *United States* v. *63,250 Gallons of Beer*, 13 F. (2d) 242.

Certain articles possessed and used by bootleggers and moonshiners have been made contraband, namely, "property designed for the manufacture of liquor," but as yet bootleggers have not been made outlaws. It is still lawful to sell them other articles. They may lawfully buy, and others may lawfully sell to them, even knowing them to be bootleggers, such things as clothing, food, automobiles, houses, furniture, machinery, building materials, and all articles of lawful commerce and trade, even including bottles and empty containers. A dealer even under § 18, may sell to a bootlegger property usable in liquor manufacture if he does not do it for the purpose of illegal manufacture.

Containers made forfeitable were not empty containers, they were the containers having illicit liquor in them. Such containers are included in the second sentence of § 25 as forfeitable in the phrase "and such liquor, the containers thereof, and such property so seized shall be subject to such disposition as the court may make thereof."

Even if some of the seized articles are considered usable for liquor manufacture, yet seizure and forfeiture is improper in the absence of a proved intention on the part of the possessor that he himself will so use them.

(1) Under the National Prohibition Act the only possession for sale that justifies seizure and forfeiture is possession for sale of liquor. § 25.

(2) As to "property designed, etc.," the only possession that justifies seizure and forfeiture is possession of usable property with the intention on the part of the possessor that he himself will use such property in the illegal manufacture of liquor which he himself intends to use in violation of law. § 25.

(3) Possession for sale of "property designed, etc.," does not carry seizure and forfeiture as a penalty, either under § 18 or § 25, but, under § 18 and § 29, carries only a fine for first offense even when all the various elements of § 18 are fully proved.

(4) Possession for sale of property either not usable for manufacture (such as bottles) or not specifically intended and sold to be illegally used (which intention must be proved as an independent fact) carries not even a criminal penalty, much less a forfeiture penalty under § 25.

The case in hand falls within the last of these four classifications; or, at the worst, this being a forfeiture case in which criminal liability is not directly involved, it may possibly, as to a few of the articles, fall under the third classification, and cannot possibly carry forfeiture as a penalty. See *Hunter* v. *United States*, 279 Fed. 567; *Rossman* v. *United States*, 280 Fed. 950; *Nosowitz* v. *United States*, 282 Fed. 575; *United States* v. *Horton*, 282 Fed. 731; *Hammerle* v. *United States*, 6 F. (2d) 144; *Stroh Products Co.* v. *Davis*, 8 F. (2d) 773; *United States* v. *301 Cans of Acme Malt Extract*, 28 F. (2d) 213; *Kohler* v. *United States*, 33 F. (2d) 225.

Assistant Attorney General Sisson, with whom *Solicitor General Thatcher*, *Assistant Attorney General Youngquist*, and *Messrs. Claude R. Branch*, *Norman J. Morris-*

son, and *D. Heywood Hardy,* Special Assistants to the Attorney General, were on the brief, for the United States.

Since there was no written waiver of jury, the review is limited to questions of law presented by the record proper. Proof of design is consequently not reviewable. The libel being sufficient, the only question is whether the property may be usable for "manufacture of liquor intended" for illegal use, that is, whether it is used in, or after, the manufacture.

The policy of the National Prohibition Act is to make the term "manufacture" inclusive. Within the meaning of the Act, no article is to be considered manufactured until put into condition for sale upon the market for the purpose for which it was intended to be used.

The word "manufacture" has been given a variety of meanings by judicial construction. *Memphis* v. *St. Louis & S. F. R. Co.,* 183 Fed. 529; *Henderson* v. *George Delker Co.,* 193 Ky. 248; *People* v. *Roberts,* 145 N. Y. 375; *Schlitz Brewing Co.* v. *United States,* 181 U. S. 584; *In re Rheinstrom & Sons Co.,* 207 Fed. 119; *Central Trust Co.* v. *George Lueders & Co.,* 221 Fed. 829; *Phillips* v. *Byers,* 189 Cal. 665; *Nixa* v. *Lehmann,* 70 Kan. 664; *Rouda* v. *United States,* 10 F. (2d) 916; *United States* v. *One Lot of Intoxicating Liquor,* 25 F. (2d) 903; *Louisville* v. *Zinmeister & Sons,* 188 Ky. 570; *P. Lorrilard Co.* v. *Ross,* 183 Ky. 217; *Standard Tailoring Co.* v. *Louisville,* 152 Ky. 504.

The policy of Congress respecting the subject matter of the whole Act should be considered. *Richardson* v. *Harmon,* 222 U. S. 96. The purpose of both the Eighteenth Amendment and of the Act was "to stop the whole business" in so far as beverage liquor was concerned, *Grogan* v. *Walker & Sons,* 259 U. S. 80. The Act aimed to suppress "the entire traffic" in intoxicating liquor as a beverage, *United States* v. *Katz,* 271 U. S. 354. It is

comprehensive and discloses an intent fully to enforce the prohibition declared, *Donnelley* v. *United States,* 276 U. S. 505.

"Manufacture" was used in its most inclusive sense. It was intended to prohibit all manufacture, except for the permitted purposes, and to reach all states in the actual process up to and including the finished product in whatever condition that might be. The prohibition against possession of property designed for the manufacture of liquor was intended to reach all steps in the same process. Necessarily, it included the ultimate product as and when fashioned for sale or other disposition. This intention is emphasized by the descriptive phrase "liquor intended for use in violating this title." Such intended illegal uses undoubtedly meant (1) possession for beverage purposes, (2) transportation, (3) sale, and (4) export. That part of the process which prepared the article for any of these uses would, then, obviously be within the scope of manufacturing it (i. e., making it ready) for that particular use. And "having regard to the artifices which are used to promote the sale of intoxicants"—*Purity Extract Co.* v. *Lynch,* 226 U. S. 192—Congress undoubtedly anticipated that synthetic and imitation liquors would be bottled, labeled, and packed for a market in which they could, with some semblance of verity at least, be there extolled as the work of the old masters. Cf. *Woolner & Co.* v. *Rennick,* 170 Fed. 662.

"Liquor intended for use in violating this title" is equivalent to "liquor intended for illegal sale"—a class of liquor which no one will contend that Congress did not mean to abolish. And manufacture becomes, then, more than a mere making of liquor. *Carroll* v. *United States,* 267 U. S. 132, 154.

It is, furthermore, reasonable and sensible to assum that Congress used the word "manufacture" to include

the preparation of liquor for a trade which demanded bottled goods.

All acts necessary to prepare liquor for sale—from the assembling of the utensils and ingredients to the finishing of the product, bottled or barreled as the case may be, and labeled as desired—are included in the manufacture. Those things which a manufacturer customarily does before sale may reasonably be said to be manufacture.

Considering the control of liquor in previous legislation as a guide to legislative intent, *United States* v. *Katz,* 271 U. S. 354, it should be observed that barreling, bottling, marking, stamping, and labeling not only devolve upon the manufacturer, but they were not uncommonly treated by Congress as part of the process of preparing for the market. And as such an incident of manufacture, these acts were closely regulated and controlled.

Even the National Prohibition Act, in parts other than § 25, reflects the close association with which Congress viewed the actual making and the bottling, labeling, and packing of liquor. §§ 1, 4, Title II.

At least, § 25 should be liberally construed. § 3, Title II; *Donnelley* v. *United States,* 276 U. S. 505.

Decisions under the Tariff Act are not controlling.

Mr. Justice Holmes delivered the opinion of the Court.

This is a libel for the forfeiture of alleged contraband liquors, property and material designed for the manufacture of contraband liquors, specifically described, and alleged to have been unlawfully held in violation of Section 25, Title II, of the National Prohibition Act. The District Court found that the allegations of fact contained in the libel were sustained and ordered a decree of forfeiture. The decree was affirmed by the Circuit Court of Appeals, 34 F. (2d) 30. A writ of certiorari was granted

by this Court but confined to the single question whether the property seized is forfeitable under Sec. 25, Title II, of the National Prohibition Act. 280 U. S. 548.

The property in question was containers, barrels, bottles, corks, labels, cartons, &c. By the statute it is "unlawful to have or possess any liquor or property designed for the manufacture of liquor intended for use in violating this chapter or which has been so used, and no property rights shall exist in any such liquor or property." A search warrant may issue "and such liquor, the containers thereof, and such property so seized shall be subject to such disposition as the court may make thereof. If it is found that such liquor or property was so unlawfully held or possessed, or had been so unlawfully used, the liquor, and all property designed for the unlawful manufacture of liquor, shall be destroyed, unless the court shall otherwise order." Act of October 28, 1919, c. 85, Title II, § 25, 41 Stat. 305, 315. U. S. Code, Title 27, § 39. The argument for the petitioner, so far as it does not go beyond the limits set in granting the writ of certiorari, is that empty containers, bottles and the other apparatus described, cannot be used in or designed for the manufacture of liquor, because the manufacture is completed before that apparatus comes into play. There is a further argument that the containers were not designed in fact for the manufacture of liquor even if they could be, but the objection to this is that if the terms in which the writ was granted do not exclude it, the case having been tried without written waiver of jury, the sufficiency and effect of evidence are not open. *Commissioner of Road District No. 2* v. *St. Louis Southwestern Ry. Co.*, 257 U. S. 547, 562.

The argument for the petitioner cannot be helped by amplification. It is obviously correct if the word "manufacture" be taken in the strictest and most exact sense. But the word may be used in a looser way to express the whole process by which an article is made

ready for sale on the open market. *P. Lorrilard Co.* v. *Ross,* 183 Ky. 217, 223. As the purpose of the Prohibition Act was to "suppress the entire traffic" condemned by the Act, *United States* v. *Katz,* 271 U. S. 354, 357, *Donnelley* v. *United States,* 276 U. S. 505, 513, it should be liberally construed to the end of this suppression, and so directs. Title II, § 3, of the Act. Code, Title 27, § 12. The decisions under the revenue acts have little weight as against legislation under the afflatus of the Eighteenth Amendment. We are of opinion that the word was used in this looser way, and that if the empty containers and the other objects seized were offered for sale in such a mode as purposely to attract purchasers who wanted them for the unlawful manufacture, as we interpret the word, they were designed for that manufacture and could be seized.

Decree affirmed.

HOME INSURANCE COMPANY ET AL. *v.* DICK ET AL.

APPEAL FROM THE SUPREME COURT OF TEXAS.

No. 232. Argued February 27, 1930.—Decided May 5, 1930.

A contract of fire insurance issued by a Mexican company, made and to be performed in Mexico, and covered in part by reinsurance effected there or in New York with New York companies licensed to do business in Texas, was assigned by the insured to a citizen of Texas who was present in Mexico when the policy issued and continued to reside there until after a loss had occurred. He then returned to Texas and sued on the policy in a Texas Court naming the Mexican company, which was never present in Texas and did not appear, as principal defendant, and the two New York companies, because of their reinsurance liability, as garnishees. The policy stipulated that no suit should be brought under it unless within one year of the loss; but a defense based on this was over-ruled by the Texas Supreme Court and recovery against the garnishees affirmed, by applying a Texas statute which forbade any agreement limiting the time for suit to a shorter period than two years

and declared that no agreement for such shorter limitation should ever be valid in that State. *Held:*

1. The objection that, as applied to contracts made and to be performed outside of Texas, the statute violates the Federal Constitution, raises federal questions of substance; and the existence of the federal claim is not disproved by saying that the statute, or the one year provision in the policy, relates to the remedy and not to the substance. P. 405.

2. That the federal questions were not raised in the trial court is immaterial, since the Court of Civil Appeals and the Supreme Court of the State considered them as properly raised in the appellate proceedings and passed on them adversely to the federal claim. P. 407.

3. The case is properly here on appeal, and petition for certiorari is therefore denied. *Id.*

4. The statute as construed and applied deprives the garnishees of property without due process of law, since the State was without power, under the circumstances, to affect the terms of the insurance contract by imposing a greater obligation than that agreed upon and to seize property in payment of the imposed obligation. *Id.*

5. When the parties to a contract have expressly agreed upon a time limit on their obligation, a statute which invalidates the agreement and directs enforcement of the contract after that time has expired increases their obligation and imposes a burden not contracted for. P. 408.

6. The statute as here involved is not one dealing with remedies and procedure merely; it purports to create rights and obligations. P. 409.

7. Assuming that a State may properly refuse to recognize foreign rights that violate its declared policy, or restrict the conduct of persons within its limits, this does not mean that it may abrogate the rights of parties beyond its borders having no relation to anything done or to be done within them. P. 410.

15 S. W. (2d) 1028, reversed.

APPEAL from a judgment of the Supreme Court of Texas affirming a judgment of the Court of Civil Appeals, 8 S. W. (2d) 354, which affirmed recoveries against the appellants in garnishment proceedings ancillary to an action on a fire insurance policy.

Messrs. David Rumsey and *Mark W. Maclay* for appellants.

A limitation on a right created by contract, valid where made, is a substantive part of the contract and is not analogous to a general statute of limitation affecting remedy only. *Riddlesbarger* v. *Hartford Ins. Co.*, 7 Wall. 386; *Semmes* v. *Hartford Ins. Co.*, 13 Wall. 158; *Guthrie* v. *Indemnity Ass'n*, 101 Tenn. 643; *Mead* v. *Insurance Co.*, 68 Kan. 432; *Suggs* v. *Insurance Co.*, 71 Tex. 579; *Humpston* v. *Mutual Life Assur. Co.*, 148 Tenn. 439; *Missouri Life Ins. Co.* v. *Cranford*, 161 Ark. 602; *Williams* v. *Vermont Mut. Fire Ins. Co.*, 20 Vt. 222; *Dolan* v. *Royal Neighbors*, 123 Mo. App. 147; *Travelers Ins. Co.* v. *California Ins. Co.*, 1 N. D. 151.

Where a right is created by a statute which includes a limitation upon the right, the expiration of the limitation has the effect not of merely barring the remedy but of extinguishing the right. *Davis* v. *Mills*, 194 U. S. 451; *The Harrisburg*, 119 U. S. 199; *Phillips* v. *Grand Trunk Ry.*, 236 U. S. 662.

The substantive provision of a contract, valid by the law of the place where the contract is made and is to be performed, creates a right of property enforcible in another jurisdiction, even though the law of the forum prohibits such a provision. *Scudder* v. *Union Nat'l Bank*, 91 U. S. 406; *Equitable Life Society* v. *Clements*, 140 U. S. 226; *Northwestern Life Ins. Co.* v. *McCue*, 223 U. S. 234; *Royal Arcanum* v. *Green*, 237 U. S. 531; *Modern Woodmen* v. *Mixer*, 267 U. S. 544; *Loucks* v. *Standard Oil Co.*, 224 N. Y. 99; *New York Life Ins. Co.* v. *Head*, 234 U. S. 149; *Mutual Life Ins. Co.* v. *Cohen*, 179 U. S. 262; *Bond* v. *Hume*, 243 U. S. 15; *Davis* v. *Mills*, 194 U. S. 451; *Converse* v. *Hamilton*, 224 U. S. 243; *New York Life Ins. Co.* v. *Dodge*, 246 U. S. 357; *Clarey* v. *Union Central Life Ins. Co.*, 143 Ky. 540; *Union Central Life Ins. Co.* v. *Barnes*, 175 Ky. 364.

The Supreme Court of Texas failed to distinguish between the effect on a contract of adverse public policy of the place where the contract was to be performed and adverse public policy of the law of the forum. Distinguishing *Knott* v. *Botany Mills*, 179 U. S. 69; *Liverpool Steam Co.* v. *Phenix Ins. Co.*, 129 U. S. 397; *The Fri*, 154 Fed. 333, certiorari denied, 210 U. S. 431; *The Miguel di Larrinaga*, 217 Fed. 678; *The Trinacria*, 42 Fed. 863.

The application of the Texas statute to abrogate a valid provision in a foreign contract impairs the obligation of contract, deprives of property without due process of law, and denies equal protection of the laws, contrary to the Constitution of the United States.

The judgment of the Texas courts against the garnishees was rendered without jurisdiction, and, therefore, deprived them of their property without due process of law.

At the time of the garnishment there was no debt owing by the American reinsurance companies to the Mexican insurance company.

Assuming that an indebtedness was in existence, it was not a *res* within the jurisdiction of the Texas courts.

Mr. John Neethe, with whom *Messrs. H. C. Hughes* and *John L. Darrouzet* were on the brief, for appellees.

This Court has no jurisdiction to revise the questions passed on by the Supreme Court of Texas.

As the Federal Constitution has no extraterritorial effect, it will not protect foreign contracts; and particularly is this true when they are in direct conflict with the law of the State of the forum where they are sought to be enforced. *King* v. *Cross*, 175 U. S. 398; *American Banana Co.* v. *United Fruit Co.*, 213 U. S. 353; *Aetna Life Ins. Co.* v. *Tremblay*, 223 U. S. 185; *League* v. *Young*, 11 How. 185; *Cunard S. S. Co.* v. *Mellon*, 262 U. S. 119;

Penfield v. *C. O. & S. W. Ry. Co.*, 134 U. S. 351; *Atchison, T. & S. F. Ry.* v. *Mills*, 53 Tex. Civ. App. 359; *Smith* v. *Webb*, 181 S. W. 820; *Canadian Pac. Ry. Co.* v. *Johnston*, 61 Fed. 738; *Finnel* v. *Southern Kansas Ry. Co.*, 33 Fed. 427; *Moores* v. *Winter*, 67 Ark. 189; *Alexander* v. *Burnett*, 39 S. C. L. 189; *Huber* v. *Steiner*, 2 Bing. 202; Story, Conflict of Laws, § 582.

The contractual provision was purely a clause of limitation and applied to the remedy only. In any event the state courts had a right to so construe the contract.

Even if it should be held that the provision in reference to limitation was a substantive part of the contract, yet such provision is in direct contravention to the policy of the State of Texas, as declared by its laws and the decisions thereunder, and the courts of Texas will not be compelled to enforce any law that is against the public policy of the State. *Smith* v. *Northern Neck Ass'n*, 112 Va. 192; *Red Cross Line* v. *Atlantic Fruit Co.*, 264 U. S. 109; *Rantoul* v. *Claremont Paper Co.*, 196 Fed. 305; *Buhl* v. *Stephens*, 84 Fed. 922; *Straesser-Arnold Co.* v. *Franklin Sugar Co.*, 8 F. (2d) 601; *Hamilton* v. *Schoenberger*, 47 Iowa 385; *National Bank* v. *Davidson*, 18 Ore. 57; *Union Trust Co.* v. *Grosman*, 245 U. S. 412; *Walworth* v. *Harris*, 129 U. S. 355; *Manigault* v. *Springs*, 199 U. S. 473; *Central American Co.* v. *Panama Ry. Co.*, 237 N. Y. 287; *Sligh* v. *Kirkwood*, 237 U. S. 59.

The appellants have been accorded due process of law in the courts of Texas. The judgment was rendered in full compliance with its law and jurisdiction properly and lawfully acquired over the American insurance companies, because immediately upon the total loss of the vessel a debt accrued from the reinsurance companies to the Mexican company and this debt the appellee had a right to subject to his claim by garnishment in accordance with the laws of the State.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

Dick, a citizen of Texas, brought this action in a court of that State against Compañia General Anglo-Mexicana de Seguros S. A., a Mexican corporation, to recover on a policy of fire insurance for the total loss of a tug. Jurisdiction was asserted *in rem* through garnishment, by ancillary writs issued against The Home Insurance Company and Franklin Fire Insurance Company, which reinsured, by contracts with the Mexican corporation, parts of the risk which it had assumed. The garnishees are New York corporations. Upon them, service was effected by serving their local agents in Texas appointed pursuant to Texas statutes, which require the appointment of local agents by foreign corporations seeking permits to do business within the State.

The controversy here is wholly between Dick and the garnishees. The defendant has never been admitted to do business in Texas; has not done any business there; and has not authorized anyone to receive service of process or enter an appearance for it in this cause. It was cited by publication, in accordance with a Texas statute; attorneys were appointed for it by the trial court; and they filed on its behalf an answer which denied liability. But there is no contention that thereby jurisdiction *in personam* over it was acquired. Dick's claim is that, since the obligation of a reinsurer to pay the original insurer arises upon the happening of the loss and is not conditional upon prior payment of the loss by the insurer, *Allemannia Fire Insurance Co.* v. *Firemen's Insurance Co.*, 209 U. S. 326; *Hicks* v. *Poe*, 269 U. S. 118, the New York companies are indebted to the Mexican company and these debts are subject to garnishment in a proceeding against the latter *quasi in rem*, even though it is not suable *in personam*. The garnishees concede that inability to sue the

Mexican corporation in Texas, *in personam*, is not material, if a cause of action against it existed at the time of garnishment and there was within the State a *res* belonging to it. But they deny the existence of the cause of action or of the *res*.

Their defense rests upon the following facts. This suit was not commenced till more than one year after the date of the loss. The policy provided: "It is understood and agreed that no judicial suit or demand shall be entered before any tribunal for the collection of any claim under this policy, unless such suits or demands are filed within one year counted as from the date on which such damage occurs." This provision was in accord with the Mexican law to which the policy was expressly made subject.[1] It was issued by the Mexican company in Mexico to one Bonner, of Tampico, Mexico, and was there duly assigned to Dick prior to the loss. It covered the vessel only in certain Mexican waters. The premium was paid in Mexico; and the loss was "payable in the City of Mexico in current funds of the United States of Mexico, or their equivalent elsewhere." [2] At the time the policy was is-

[1] The policy contained also the provision: "The present policy is subjected to the disposition of the Commercial Code, in that it does not alter or modify the stipulations which that same contains." The dispositions of the Commercial Code thus incorporated are: "Article 1038. The rights of action derived from commercial acts shall be subject to prescription in accordance with the provisions of this Code. Article 1039. The periods fixed for the enforcement of rights of action arising out of commercial acts shall be fatal except restitution against same is given. Article 1043. One year shall prescribe actions derived from contracts of life insurance, sea and land."

[2] The loss was made payable to Dick and the Texas and Gulf Steamship Co. as their interests might appear. The Steamship Company and Suderman & Young, Inc., assignee of part of the cause of action, intervened as plaintiffs and are joined with Dick as appellees. As there are no rights peculiar to them, they need not be further referred to. Dick contends that since the policy was payable to the

sued, when it was assigned to him, and until after the loss, Dick actually resided in Mexico, although his permanent residence was in Texas. The contracts of reinsurance were effected by correspondence between the Mexican company in Mexico and the New York companies in New York. Nothing thereunder was to be done, or was in fact done, in Texas.

In the trial court, the garnishees contended that since the insurance contract was made and was to be performed in Mexico, and the one year provision was valid by its laws, Dick's failure to sue within one year after accrual of the alleged cause of action was a complete defense to the suit on the policy; that this failure also relieved the garnishees of any obligation as reinsurers, the same defense being open to them, *New York State Marine Ins. Co.* v. *Protection Ins. Co.*, 1 Story 458, 460; and that they, consequently, owed no debt to the Mexican company subject to garnishment.[3] To this defense, Dick demurred, on the ground that Article 5545 of the Texas Revised Civil Statutes (1925) provides: "No person, firm, corporation, association or combination of whatsoever kind shall enter into any stipulation, contract, or agree-

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Texas and Gulf Steamship Co., the contract was performable in Texas. The contention is in conflict with the quoted language of the policy and there is no provision otherwise lending support to the argument. Texas is nowhere mentioned in the policy. Moreover, there is nothing in the record to show that the Steamship Company's sole place of business was in Texas. The State courts made no findings on this claim.

[3] Besides the defense here discussed the answers both of the Mexican corporation and of the garnishees alleged: (2) that the suit was not brought within the period provided by the Commercial Code of Mexico, and that thereby the right of action was completely barred upon the expiration of one year; (3) that the policy was void because of plaintiff's misrepresentations as to the value of the vessel; (4) that the vessel was not a total loss and was abandoned in violation of the terms of the policy. None of these defenses needs to be considered.

ment, by reason whereof the time in which to sue thereon is limited to a shorter period than two years. And no stipulation, contract, or agreement for any such shorter limitation in which to sue shall ever be valid in this State."

The trial court sustained Dick's contention and entered judgment against the garnishees. On appeal, both in the Court of Civil Appeals (8 S. W. (2d) 354) and in the Supreme Court of the State (15 S. W. (2d) 1028), the garnishees asserted that, as construed and applied, the Texas statute violated the due process clause of the Fourteenth Amendment and the contract clause. Both courts treated the policy provision as equivalent to a foreign statute of limitation; held that Article 5545 related to the remedy available in Texas courts; concluded that it was validly applicable to the case at bar; and affirmed the judgment of the trial court. The garnishees appealed to this Court on the ground that the statute, as construed and applied, violated their rights under the Federal Constitution. Dick moved to dismiss the appeal for want of jurisdiction. Then the garnishees filed, also, a petition for a writ of certiorari. Consideration of the jurisdiction of this Court on the appeal, and of the petition for certiorari, was postponed to the hearing of the case on the merits.

First. Dick contends that this Court lacks jurisdiction of the action, because the errors assigned involve only questions of local law and of conflict of laws. The argument is that while a provision requiring notice of loss within a fixed period, is substantive because it is a condition precedent to the existence of the cause of action, the provision for liability only in case suit is brought within the year is not substantive because it relates only to the remedy after accrual of the cause of action; that while the validity, interpretation and performance of the substantive provisions of a contract are determined by

the law of the place where it is made and is to be performed, matters which relate only to the remedy are unquestionably governed by the *lex fori*; and that even if the Texas court erred in holding the statute applicable to this contract, the error is one of state law or of the interpretation of the contract, and is not reviewable here.

The contention is unsound. There is no dispute as to the meaning of the provision in the policy. It is that the insurer shall not be liable unless suit is brought within one year of the loss. Whether the provision be interpreted as making the commencement of a suit within the year a condition precedent to the existence of a cause of action, or as making failure to sue within the year a breach of a condition subsequent which extinguishes the cause of action, is not of legal significance here.[4] Nor are we concerned with the question whether the provision is properly described as relating to remedy or to substance. However characterized, it is an express term in the contract of the parties by which the right of the insured and the correlative obligation of the insurer are defined. If effect is given to the clause, Dick cannot recover from the Mexican corporation and the garnishees cannot be compelled to pay. If, on the other hand, the statute is applied to the contract, it admittedly abrogates a contractual right

[4] That a provision requiring notice of loss within a fixed period and one requiring the bringing of suit, stand upon the same footing was held in *Riddlesbarger* v. *Hartford Insurance Co.*, 7 Wall. 386, 390. Compare *Semmes* v. *Hartford Insurance Co.*, 13 Wall. 158, 161. The validity and effectiveness of a clause limiting the time for suit, in the absence of a controlling statute, was recognized also in Texas, *Suggs* v. *Travelers Insurance Co.*, 71 Texas 579. In that case, decided before the enactment of Article 5545, the Texas court upheld a similar provision in an insurance policy against the claim of an infant without capacity to sue. The court described the nature of the provision thus (p. 581): "It is said to differ from the statutory limitation in this, that it does not merely deny the remedy, but forfeits the liability when the suit is not brought within the stipulated time."

and imposes liability, although the parties have agreed that there should be none.

The statute is not simply one of limitation. It does not merely fix the time in which the aid of the Texas courts may be invoked. Nor does it govern only the remedies available in the Texas courts. It deals with the powers and capacities of persons and corporations. It expressly prohibits the making of certain contracts. As construed, it also directs the disregard in Texas of contractual rights and obligations wherever created and assumed; and it commands the enforcement of obligations in excess of those contracted for. Therefore, the objection that, as applied to contracts made and to be performed outside of Texas, the statute violates the Federal Constitution, raises federal questions of substance; and the existence of the federal claim is not disproved by saying that the statute, or the one year provision in the policy, relates to the remedy and not to the substance.

That the federal questions were not raised in the trial court is immaterial. For, the Court of Civil Appeals and the Supreme Court of the State considered the questions as properly raised in the appellate proceedings and passed on them adversely to the federal claim. *Chicago, Rock Island & Pacific Ry. Co.* v. *Perry,* 259 U. S. 548, 551; *Sully* v. *American National Bank,* 178 U. S. 289, 298. The case is properly here on appeal. The motion to dismiss the appeal is overruled; and the petition for certiorari is, therefore, denied.

Second. The Texas statute as here construed and applied deprives the garnishees of property without due process of law. A State may, of course, prohibit and declare invalid the making of certain contracts within its borders. Ordinarily, it may prohibit performance within its borders, even of contracts validly made elsewhere, if they are required to be performed within the State and their performance would violate its laws. But, in the

case at bar, nothing in any way relating to the policy sued on, or to the contracts of reinsurance, was ever done or required to be done in Texas. All acts relating to the making of the policy were done in Mexico. All in relation to the making of the contracts of re-insurance were done there or in New York. And, likewise, all things in regard to performance were to be done outside of Texas. Neither the Texas laws nor the Texas courts were invoked for any purpose, except by Dick in the bringing of this suit. The fact that Dick's permanent residence was in Texas is without significance. At all times here material, he was physically present and acting in Mexico. Texas was, therefore, without power to affect the terms of contracts so made. Its attempt to impose a greater obligation than that agreed upon and to seize property in payment of the imposed obligation violates the guaranty against deprivation of property without due process of law. *Compañía General de Tabacos* v. *Collector of Internal Revenue*, 275 U. S. 87; *Aetna Life Ins. Co.* v. *Dunken*, 266 U. S. 389; *New York Life Ins. Co.* v. *Dodge*, 246 U. S. 357. Compare *Modern Woodmen of America* v. *Mixer*, 267 U. S. 544, 551.[5]

The cases relied upon, in which it was held that a State may lengthen its statute of limitations, are not in point.

[5] The division of this Court in the *Tabacos* and *Dodge* cases was not on the principle here stated, but on the question of fact whether there were in those cases things done within the State of which the State could properly lay hold as the basis of the regulations there imposed. Compare *Bothwell* v. *Buckbee, Mears Co.*, 275 U. S. 274; *Palmetto Fire Ins. Co.* v. *Conn*, 272 U. S. 295. In the absence of any such things, as in this case, the Court was agreed that a State is without power to impose either public or private obligations on contracts made outside of the State and not to be performed there. Compare *Mutual Life Insurance Co.* v. *Liebing*, 259 U. S. 209; E. Merrick Dodd, Jr., "The Power of the Supreme Court to Review State Decisions in the Field of Conflict of Laws," 39 Harv. L. Rev. (1926) 533, 548.

See *Atchafalaya Land Co.* v. *Williams Cypress Co.*, 258 U. S. 190; *National Surety Co.* v. *Architectural Decorating Co.*, 226 U. S. 276; *Vance* v. *Vance*, 108 U. S. 514. In those cases, the parties had not stipulated a time limit for the enforcement of their obligations. It is true that a State may extend the time within which suit may be brought in its own courts, if, in doing so, it violates no agreement of the parties.[6] And, in the absence of a contractual provision, the local statute of limitation may be applied to a right created in another jurisdiction even where the remedy in the latter is barred.[7] In such cases, the rights and obligations of the parties are not varied. When, however, the parties have expressly agreed upon a time limit on their obligation, a statute which invalidates the agreement and directs enforcement of the contract after the time has expired increases their obligation and imposes a burden not contracted for.

It is true also that a State is not bound to provide remedies and procedure to suit the wishes of individual litigants. It may prescribe the kind of remedies to be available in its courts and dictate the practice and procedure to be followed in pursuing those remedies. Con-

[6] The State courts placed some reliance on *Campbell* v. *Holt*, 115 U. S. 620. Whether, as there held, a statute of limitations may also be lengthened so as to affect liabilities already barred is not here pertinent. There is a clear difference between the revival of a liability which is unenforcible only because a statute has barred the remedy regardless of the will of the parties, and the extension of a liability beyond the limit expressly agreed upon by the parties. Compare *National Surety Co.* v. *Architectural Decorating Co.*, 226 U. S. 276, 282; *William Danzer & Co.* v. *Gulf & Ship Island R. R. Co.*, 268 U. S. 633, 636.

[7] Whether a distinction is to be drawn between statutes of limitation which extinguish or limit the right and those which merely bar the remedy, we need not now determine. Compare *Davis* v. *Mills*, 194 U. S. 451 and *Texas Portland Cement Co.* v. *McCord*, 233 U. S. 157 with *Canadian Pac. Ry. Co.* v. *Johnston*, 61 Fed. 738.

tractual provisions relating to these matters, even if valid where made, are often disregarded by the court of the forum, pursuant to statute or otherwise. But the Texas statute deals neither with the kind of remedy available nor with the mode in which it is to be pursued. It purports to create rights and obligations. It may not validly affect contracts which are neither made nor are to be performed in Texas.

Third. Dick urges that Article 5545 of the Texas law is a declaration of its public policy; and that a State may properly refuse to recognize foreign rights which violate its declared policy. Doubtless, a State may prohibit the enjoyment by persons within its borders of rights acquired elsewhere which violate its laws or public policy; and, under some circumstances, it may refuse to aid in the enforcement of such rights. *Bothwell* v. *Buckbee, Mears Co.*, 275 U. S. 274, 277-9; *Union Trust Co.* v. *Grosman*, 245 U. S. 412; compare *Fauntleroy* v. *Lum*, 210 U. S. 230. But the Mexican corporation never was in Texas; and neither it nor the garnishees invoked the aid of the Texas courts or the Texas laws. The Mexican corporation was not before the court. The garnishees were brought in by compulsory process. Neither has asked favors. They ask only to be let alone. We need not consider how far the State may go in imposing restrictions on the conduct of its own residents, and of foreign corporations which have received permission to do business within its borders; or how far it may go in refusing to lend the aid of its courts to the enforcement of rights acquired outside its borders. It may not abrogate the rights of parties beyond its borders having no relation to anything done or to be done within them.

Fourth. Finally, it is urged that the Federal Constitution does not require the States to recognize and protect rights derived from the laws of foreign countries—that as to them the full faith and credit clause has no applica-

tion. See *Aetna Life Ins. Co.* v. *Tremblay,* 223 U. S. 185. The claims here asserted are not based upon the full faith and credit clause. Compare *Royal Arcanum* v. *Green,* 237 U. S. 531; *Modern Woodmen of America* v. *Mixer,* 267 U. S. 544. They rest upon the Fourteenth Amendment. Its protection extends to aliens. Moreover, the parties in interest here are American companies. The defense asserted is based on the provision of the policy and on their contracts of reinsurance. The courts of the State confused this defense with that based on the Mexican Code. They held that even if the effect of the foreign statute was to extinguish the right, Dick's removal to Texas prior to the bar of the foreign statute, removed the cause of action from Mexico and subjected it to the Texas statute of limitation. And they applied the same rule to the provision in the policy. Whether or not that is a sufficient answer to the defense based on the foreign law, we may not consider; for, no issue under the full faith and credit clause was raised. But in Texas, as elsewhere, the contract was subject to its own limitations.

Fifth. The garnishees contend that the guaranty of the contract clause relates not to the date of enactment of a statute, but to the date of its effect on contracts; that, when issued, the policy of the Mexican corporation was concededly not subject to Texas law; that, although the statute relied upon by Dick was passed prior to the making of the contract, it did not operate upon the contract until this suit was brought in the Texas court; and that, hence, the statute violates the contract clause. Since we hold that the Texas statute, as construed and applied, violates the due process clause, we have no occasion to consider this contention. Nor have we considered their further contention, in reliance upon *Morris & Co.* v. *Skandinavia Ins. Co.,* 279 U. S. 405, that there was lack of jurisdiction over them for purposes of garnishment, because the authorization of service upon their local agents is lim-

ited to suits brought against them as defendants. For, this objection was not made or considered below on constitutional grounds.

Reversed.

BOARD OF RAILROAD COMMISSIONERS OF NORTH DAKOTA ET AL. *v.* GREAT NORTHERN RAILWAY COMPANY ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NORTH DAKOTA.

No. 364. Argued April 17, 1930.—Decided May 19, 1930.

1. Save as may be validly provided by Act of Congress, railroad rates established by a State for its internal commerce can not be interfered with by the federal courts upon the ground that they work undue and unreasonable discrimination against interstate commerce. Pp. 420 *et seq.*
2. Whether intrastate railroad rates ordered by state authority should be set aside as working undue and unreasonable discrimination against interstate commerce is a question which, by the Interstate Commerce Act, is confided for determination in the first instance to the Interstate Commerce Commission. *Id.*
3. Where the sole objection to a state order reducing intrastate rates is alleged undue discrimination against interstate commerce, a federal court has no authority to enjoin their enforcement—not even temporarily, to await the Commission's determination of that question in a pending proceeding. P. 430.

33 F. (2d) 934, reversed.

APPEAL from a decree of interlocutory injunction granted by the District Court of three judges, in a suit brought by a number of railroads attacking an order of the Railroad Commissioners fixing intrastate class rates in North Dakota.

Mr. James Morris, Attorney General of North Dakota, with whom *Mr. John E. Benton* was on the brief, for appellants.

The Fourteenth Amendment is self-acting. It requires no legislation to carry it into effect. The Amendment itself provides that "No State shall . . . deprive any person of life, liberty, or property, without due process of law." A state statute or other law, such as a rate prescribed by state authority, is ineffective if it will operate to cause confiscation; and the courts have jurisdiction to determine that question in a suit brought to enjoin its enforcement.

The commerce clause, however, while it inhibits state action which would place a direct burden upon interstate commerce, as respects the internal commerce of the State has no other effect than to empower the Congress to legislate, in so far as may be necessary for the effective regulation of interstate and foreign commerce. Under this clause the federal courts have no jurisdiction, as respects intrastate rates, except for the enforcement of some Act of Congress. Such rates, lawfully prescribed, may be affected only in the manner and to the extent that Congress by legislation, for the proper protection of interstate commerce, has provided.

The pendency before the Interstate Commerce Commission of a proceeding under § 13 of the Interstate Commerce Act involving the order of the Board of Railroad Commissioners of May 8, 1929, is not ground for injunction, and does not confer jurisdiction to grant an interlocutory injunction.

It is a well settled rule, adopted for the preservation of uniformity, which it was the purpose of the Interstate Commerce Act to secure, that the courts may not exert authority over subjects which primarily come within the jurisdiction of the Commission in advance of its action. *Great Northern Ry.* v. *Merchants Elevator Co.*, 259 U. S. 285; *Texas & Pac. Ry. Co.* v. *American Tie & Timber Co.*, 234 U. S. 138; *Texas & Pac. Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426; *Morrisdale Coal Co.* v. *Pennsyl-*

vania R. Co., 230 U. S. 303; *Mitchell Coal & C. Co.* v. *Pennsylvania R. Co.*, 230 U. S. 247; *Baltimore & O. R. Co.* v. *United States*, 215 U. S. 481; *Director General* v. *Viscose Co.*, 254 U. S. 398; *Northern Pac. R. Co.* v. *Solum*, 247 U. S. 477.

The discretion of the Board of Railroad Commissioners in fixing intrastate rates should not be interfered with by the courts in the absence of a finding by the Interstate Commerce Commission to the effect that such intrastate rates cast a discriminatory burden upon interstate commerce or discriminate against persons or places engaged in interstate commerce.

The plaintiffs had at the time of the commencement of this action, a plain, adequate and complete remedy at law in the courts of North Dakota. *State ex rel. Hughes* v. *Milhollan*, 50 N. D. 184.

Mr. R. J. Hagman, with whom *Messrs. D. F. Lyons* and *F. G. Dorety* were on the brief, for appellees.

A federal court of equity has power to prevent irreparable loss and damage, or a threatened violation of law, by enjoining intrastate rates until the Interstate Commerce Commission can determine in a pending proceeding whether such rates unjustly discriminate against interstate commerce.

A State is prohibited from unjustly discriminating against interstate commerce. *The Shreveport Case*, 234 U. S. 342; *Railroad Comm'n* v. *Chicago, B. & Q. R. Co.*, 257 U. S. 563.

The Commission has sole jurisdiction to determine the question of unjust discrimination against interstate commerce. *Texas & Pac. R. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426; *Houston & T. R. Co.* v. *United States*, 234 U. S. 342.

Unjust discrimination against interstate commerce by States is forbidden before as well as after the Commission

determines the existence of such discrimination. Paragraph (4) of § 13 of the Interstate Commerce Act is an unconditional condemnation of unjust discrimination against interstate commerce by States. Section 13 forbade and declared unlawful such unjust discrimination at all times.

Unjust discriminations in freight rates were prohibited by the common law. See *Interstate Commerce Comm'n* v. *B. & O. R. Co.*, 145 U. S. 263; *Sullivan* v. *M. & R. R. Ry. Co.*, 121 Minn. 488; *Homestead Co.* v. *Des Moines Elec. Co.*, 248 Fed. 439.

The courts will enforce the prohibition against unjust discrimination against interstate commerce by intrastate rates imposed by a State, since the Interstate Commerce Act saves common law remedies. § 22, par. 1; *Pennsylvania R. Co.* v. *Sonman Coal Co.*, 242 U. S. 120. And the power to prevent irreparable damage or to enjoin a proposed unlawful act is inherent in a federal court of equity. Jud. Code, § 24, par. 8; *Northern Pac. R. Co.* v. *Pacific Lumber Mfrs. Ass'n*, 165 Fed. 1.

In analogous cases courts of equity have prevented irreparable damage or a threatened violation of law by holding matters *in statu quo* until another tribunal having jurisdiction of a controversy can determine it. *Western Union* v. *Louisville & N. R. Co.*, 201 Fed. 946; *Zimmerman* v. *McCurdy*, 15 N. D. 79; *Elliott* v. *Rich*, 24 N. M. 52; *Union Pac. R. Co.* v. *Lumber Mfrs. Ass'n*, 165 Fed. 13; *Great Northern R. Co.* v. *Kalispell Lumber Co.*, 165 Fed. 25; *Tift* v. *Southern Ry.*, 123 Fed. 789; *Kiser Co.* v. *Central of Georgia*, 158 Fed. 193. *Tift* case, 206 U. S. 428, at p. 437.

Atlantic Coast Line v. *Macon Grocery Co.*, 166 Fed. 206 is *contra* on the present question.

The Commission has passed on § 13 petitions while intrastate rates were enjoined. *Fertilizer between Southern Points*, 113 I. C. C. 389.

Messrs. Henry N. Benson, Attorney General of Minnesota, *Charles E. Phillips* and *John F. Bonner,* Assistant Attorneys General, by special leave of Court, filed a brief as *amici curiae,* on behalf of the Railroad and Warehouse Commission of Minnesota.

Mr. John E. Benton, by special leave of Court, filed a brief as *amicus curiae,* on behalf of the Public Service Commission of Alabama et al.

Mr. Chief Justice Hughes delivered the opinion of the Court.

On May 8, 1929, the Board of Railroad Commissioners of the State of North Dakota made an order prescribing intrastate class rates. The existing rates were reduced about ten per cent and the order was made effective on July 1, 1929. The appellees, common carriers engaged in interstate transportation and also in intrastate transportation in North Dakota, brought this suit on June 25, 1929, in the District Court to enjoin enforcement of the order pending the determination by the Interstate Commerce Commission of the question whether the intrastate rates, as thus prescribed, cause an undue or unreasonable discrimination against interstate commerce in violation of Section 13 of the Interstate Commerce Act. The District Court, composed of three Judges, as required by statute, granted an interlocutory injunction to this effect (33 Fed. (2d) 934) and the Railroad Commission of the State and the other State officials, who were defendants, have brought this appeal.

On August 26, 1920, the Interstate Commerce Commission, in a proceeding known as *Ex parte 74,* authorized a general advance in interstate freight rates throughout the United States. *Increased Rates, 1920,* 58 I. C. C. 220. The appellees then applied to the Board of Railroad Commissioners of North Dakota for authority to make

increases in the North Dakota intrastate class rates to correspond with the increases which had been made in the interstate class rates. The State Commission denied the application. Thereupon, in a proceeding (Docket No. 12,085) under Section 13 of the Interstate Commerce Act the Interstate Commerce Commission made a finding that the interstate rates established by the carriers, as a result of the decision in *Ex parte 74*, were reasonable for interstate transportation and that the failure correspondingly to increase the intrastate rates within the State of North Dakota resulted in an undue preference to the shippers of intrastate traffic within that State and in an unjust discrimination against interstate commerce. On May 3, 1921, the Interstate Commerce Commission entered an order requiring these carriers to increase the intrastate freight rates in North Dakota so as to correspond with the advances in interstate rates. *North Dakota Rates, Fares, and Charges*, 61 I. C. C. 504. These increases were made, effective May 27, 1921.

On June 5, 1922, the Board of Railroad Commissioners of North Dakota made an order reciting that the order of the Interstate Commerce Commission of May 3, 1921, practically deprived the State Commission of its power to regulate intrastate rates and that appropriate action should be taken to terminate the disability. Upon application by the State Commission, the Interstate Commerce Commission (July 22, 1922) vacated its order of May 3, 1921, in so far as it related to intrastate rates in North Dakota, stating that "the existing increased intrastate rates and charges for freight services in said State will continue in force and effect until revoked, modified or superseded by appropriate lawful proceedings before said Board" (the State Commission) "or as otherwise provided by law." The State Commission was thus left free to exercise its lawful authority over intrastate rates.

The Congress, by Joint Resolution of January 30, 1925 (43 Stat. 801), directed the Interstate Commerce Commission to make an investigation of the rate structure of common carriers in order to determine to what extent and in what manner existing rates and charges might be unreasonable or unjustly discriminatory, and to make such changes, adjustments and redistribution of rates and charges as might be found to be necessary. The Commission was required to make from time to time such decisions as it might deem appropriate to establish a just and reasonable relation between rates upon designated classes of traffic.[1] Pursuant to this direction, the Inter-

[1] The provision relating to the investigation is as follows:

"That the Interstate Commerce Commission is authorized and directed to make a thorough investigation of the rate structure of common carriers subject to the interstate commerce act, in order to determine to what extent and in what manner existing rates and charges may be unjust, unreasonable, unjustly discriminatory, or unduly preferential, thereby imposing undue burdens, or giving undue advantage as between the various localities and parts of the country, the various classes of traffic, and the various classes and kinds of commodities, and to make, in accordance with law, such changes, adjustments, and redistribution of rates and charges as may be found necessary to correct any defects so found to exist. In making any such change, adjustment, or redistribution the commission shall give due regard, among other factors, to the general and comparative levels in market value of the various classes and kinds of commodities as indicated over a reasonable period of years, to a natural and proper development of the country as a whole, and to the maintenance of an adequate system of transportation. In the progress of such investigation the commission shall, from time to time, and as expeditiously as possible, make such decisions and orders as it may find to be necessary or appropriate upon the record then made in order to place the rates upon designated classes of traffic upon a just and reasonable basis with relation to other rates. Such investigation shall be conducted with due regard to other investigations or proceedings affecting rate adjustments which may be pending before the commission," 43 Stat. 801.

state Commerce Commission on March 12, 1925, instituted the proceeding known as Docket No. 17000, "Rate Structure Investigation," and all common carriers subject to the Interstate Commerce Act were made respondents. Notice was sent to the Governor of each State and to the state regulatory commissions. The Interstate Commerce Commission thus undertook the investigation of the rate structure in the entire western district, including class rates in the region embracing the State of North Dakota. The Board of Railroad Commissioners of that State, with other state railroad commissions, have been coöperating in this investigation and the proceeding is still pending.

On May 29, 1925, the Board of Railroad Commissioners of North Dakota on its own motion began an investigation for the purpose of determining to what extent, if any, the North Dakota intrastate rates were unreasonable or unjustly discriminatory. In September, 1927, the State Commission directed that the record should be held open for further hearing after the Interstate Commerce Commission rendered a decision in its Docket No. 17000. A few months later, the State Commission resumed its general investigation and a hearing was held in relation to class rates and certain other rates. This resulted in the order of May 8, 1929, now in question, reducing the existing intrastate class rates.

The appellees then filed a petition with the Interstate Commerce Commission alleging that the scale of class rates required by the State Commission would unjustly discriminate against persons and localities in interstate commerce, and would constitute an unreasonable burden on interstate commerce, in violation of Section 13 of the Interstate Commerce Act, and asked the Interstate Commerce Commission to institute a proceeding to determine whether such unjust discrimination would result and to

prohibit it by prescribing the class rates to be charged by the carriers for intrastate transportation in North Dakota. Thereupon, this suit was brought. The interlocutory injunction, granted below, restrained the State Commission and other state officials from putting into effect the intrastate class rates prescribed by the order of May 8, 1929, until the Interstate Commerce Commission, either in its Docket No. 17000, or in the proceeding under Section 13 of the Interstate Commerce Act which the plaintiffs (appellees) had petitioned the Interstate Commerce Commission to institute, determined the question of unjust discrimination with respect to interstate commerce, and until the further order of the Court.

It should be observed at the outset that there is no contention on the part of the carriers that the intrastate rates fixed by the State Commission are confiscatory. There is no challenge of the authority of the State Commission under the constitution and laws of the State to prescribe these rates for intrastate traffic, or of the validity or regularity of the proceedings which resulted in the order of the State Commission, aside from the alleged effect upon interstate commerce.

The question of the control of the State, as against an objection of this sort, over rates for transportation exclusively intrastate was considered in the *Minnesota Rate Cases*. (230 U. S. 352.) The State of Minnesota had established rates for intrastate transportation throughout the State, and the complaining carriers insisted that by reason of the passage of the Interstate Commerce Act the State could no longer exercise the untrammeled statewide authority that it had formerly enjoyed in prescribing reasonable intrastate rates, and that the scheme of rates which Minnesota had prescribed, even if found to be otherwise not subject to attack, was void because of their injurious effect upon interstate commerce. There had been no finding by the Interstate Commerce Commission

of unjust discrimination against interstate commerce by reason of the intrastate rates and, reserving the question of the validity and consequence of such a finding if one were made by the Interstate Commerce Commission, the Court decided that there was no ground for invalidating the action of the State. Dealing with the interblending of operations in the conduct of interstate and local business by interstate carriers, the Court said that these considerations were for the practical judgment of Congress, and that if adequate regulation of interstate rates could not be maintained without imposing requirements as to such intrastate rates as substantially affected the former, it was for Congress, within the limits of its constitutional authority over interstate commerce, to determine the measure of the regulation it should apply. It was not the function of the Court to provide a more comprehensive scheme of regulation than Congress had decided upon, nor, in the absence of Federal action, to deny effect to the laws of the State enacted within the field which it was entitled to occupy until its authority was limited through the exertion by Congress of its paramount constitutional power. On the assumption that Section 3 of the Interstate Commerce Act should be construed as applicable to unreasonable discriminations between localities in different States, as well when arising from an intrastate rate as compared with an interstate rate as when due to interstate rates exclusively, the Court was of the opinion that the controlling principle governing the enforcement of the act should be applied to such cases and that the question of the existence of such a discrimination would be primarily for the investigation and determination of the Interstate Commerce Commission and not for the courts. (*Id.* p. 419.)

The controlling principle, thus invoked, was derived from a consideration of the nature of the question and of the inquiry and action required for its solution. The

inquiry would necessarily relate to technical and intricate matters of fact, and the solution of the question would demand the exercise of sound administrative discretion. The accomplishment of the purpose of Congress could not be had without the comprehensive study of an expert body continuously employed in administrative supervision. Only through the action of such a body could there be secured the uniformity of ruling upon which appropriate protection from unreasonable exactions and unjust discriminations must depend. (*Id.* pp. 419, 420. See *Great Northern Railway Company* v. *Merchants Elevator Company,* 259 U. S. 285, 291.)

The application of this principle had frequent illustration before the question arose as to unjust discriminations against interstate commerce through the fixing of intrastate rates. In *Texas & Pacific Railway Company* v. *Abilene Cotton Oil Company* (204 U. S. 426), the Court decided that a shipper could not maintain an action because of the exaction of an alleged unreasonable rate on interstate shipments, when the rate had been duly filed and published by the carrier and had not been found to be unreasonable by the Interstate Commerce Commission. The Court found an indissoluble unity between the provision for the maintenance of rates as established in accordance with the statute and the prohibitions against preferences and discriminations, and declared that to maintain the just relation which the statute was intended to conserve it was essential that there should be uniformity of decision and that redress should be sought primarily through the administrative powers entrusted to the Interstate Commerce Commission. In *Baltimore & Ohio Railroad Company* v. *United States ex rel. Pitcairn Coal Company* (215 U. S. 481), complaint was made by the coal company of the method of distribution of coal cars, which was said to amount to an unjust discrimination. The Court considered the controversy to be con-

trolled by the decision in the *Abilene* case, *supra;* and that the grievances of which complaint was made were primarily within the administrative competency of the Interstate Commerce Commission. The Court said that the amendments of 1906 of the Interstate Commerce Act rendered, if possible, more imperative the construction which had been given to the act in this respect. After adverting to the case of *Interstate Commerce Commission* v. *Illinois Central Railroad Company* (215 U. S. 452), the Court again pointed out "the destructive effect upon the system of regulation adopted by the Act to Regulate Commerce," if it were construed as "giving authority to the courts, without the preliminary action of the commission, to consider and pass upon the administrative questions which the statute has primarily confided to that body." (215 U. S. p. 496.) The question was again considered in *Robinson* v. *Baltimore & Ohio Railroad Company* (222 U. S. 506), where the Court held that no action for reparation for discriminatory exactions for freight payments could be maintained in any Court, Federal or state, in the absence of an appropriate finding and order of the Interstate Commerce Commission. Referring to the *Abilene* case, *supra,* the Court said, "It is true that . . . in that case the complaint against the established rate was that it was unreasonable, while here the complaint is that the rate was unjustly discriminatory. But the distinction is not material." (*Id.* p. 511.) [2]

[2] See, also, *United States* v. *Pacific & Arctic Co.,* 228 U. S. 87, 107, 108; *Mitchell Coal Co.* v. *Pennsylvania R. R. Co.,* 230 U. S. 247, 259; *Texas & Pacific Railway Co.* v. *American Tie & Lumber Co.,* 234 U. S. 138, 147; *Pennsylvania R. R. Co.* v. *Puritan Coal Co.,* 237 U. S. 121, 131; *Pennsylvania R. R. Co.* v. *Clark Coal Co.,* 238 U. S. 456, 469; *Northern Pacific Railway Co.* v. *Solum,* 247 U. S. 477, 483; *Director General of Railroads* v. *Viscose Company,* 254 U. S. 498, 504; *Great Northern Railway Co.* v. *Merchants Elevator Company,* 259 U. S. 285, 291, 295; *Terminal R. R. Ass'n* v. *United States,* 266 U. S. 17, 31; *Western & Atlantic Railroad* v. *Georgia Public Service Commission,* 267 U. S. 493, 497.

The grounds for invoking this principle of preliminary resort to the Interstate Commerce Commission are even stronger when the effort is made to invalidate intrastate rates upon the ground of unjust discrimination against interstate commerce. Not only are the questions as to the effect of intrastate rates upon interstate rates quite as intricate as those relating to discrimination in interstate rates, not only is there at least an equal need for the comprehensive, expert and continuous study of the Interstate Commerce Commission, and for the uniformity obtainable only through its action, but in addition there is involved a prospective interference with State action within its normal field, in relation to the domestic concern of transportation exclusively intrastate. The Court found no warrant for the contention that Congress in enacting the Interstate Commerce Act intended that there should be such an interference before the fact of unjust discrimination had been established by competent inquiry on the part of the administrative authority to which Congress had entrusted the solution of that class of questions.

What was lacking in the *Minnesota Rate Cases, supra,* had been supplied in the *Shreveport Case* (234 U. S. 342).[3] There, the Interstate Commerce Commission had found that there was an unjust discrimination arising out of the relation of intrastate rates, maintained under State authority, to interstate rates which had been upheld as reasonable. The Court decided that Congress in exercising its constitutional authority could correct the evil of this discrimination against interstate commerce and that in so doing Congress was entitled to secure the maintenance of its own standard of interstate rates. Having this power, Congress could provide for its exercise through the aid of a subordinate body. The removal of the discrimination

[3] *Houston, East and West Texas Railway Company* v. *United States,* 234 U. S. 342.

was within the authority granted to the Interstate Commerce Commission and the decision rested upon the ground that this authority had been exercised. (*Id.* pp. 357, 358. See, also *American Express Company* v. *Caldwell,* 244 U. S. 617, 625; *Illinois Central Railroad Company* v. *State Public Utilities Commission,* 245 U. S. 493, 506; *Arkansas Railroad Commission* v. *Chicago R. I. & P. R. R. Co.,* 274 U. S. 597, 599.)

In the Transportation Act, 1920 (41 Stat. 484) Congress enacted express provisions with respect to intrastate rates, regulations and practices. (*Id.* Sec. 416.) Amending Section 13 of the Act to Regulate Commerce, Congress authorized the Interstate Commerce Commission to confer with state regulatory bodies with respect to "the relationship between rate structures and practices of carriers subject to the jurisdiction of such State bodies and of the Commission," and to hold joint hearings. It was provided that whenever in any such investigation, after full hearing, the Commission finds that any rate, regulation or practice "causes any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce, which is hereby forbidden and declared to be unlawful," the Commission shall prescribe the rate, regulation or practice "thereafter to be observed, in such manner as, in its judgment, will remove" the discrimination. The order of the Commission is to bind the carriers, parties to the proceeding, "the law of any State or the decision or order of any State authority to the contrary notwithstanding."[4]

[4] The text of the provisions thus added to Section 13 is as follows:

"Sec. 13. . . .

"(3) Whenever in any investigation under the provisions of this Act, or in any investigation instituted upon petition of the carrier

There can be no doubt that Congress thus intended to recognize and incorporate in legislative enactment the principle of the *Shreveport Case, supra.*[5] We find no

concerned, which petition is hereby authorized to be filed, there shall be brought in issue any rate, fare, charge, classification, regulation, or practice, made or imposed by authority of any State, or initiated by the President during the period of Federal control, the Commission, before proceeding to hear and dispose of such issue, shall cause the State or States interested to be notified of the proceeding. The Commission may confer with the authorities of any State having regulatory jurisdiction over the class of persons and corporations subject to this Act with respect to the relationship between rate structures and practices of carriers subject to the jurisdiction of such State bodies and of the Commission; and to that end is authorized and empowered, under rules to be prescribed by it, and which may be modified from time to time, to hold joint hearings with any such State regulating bodies on any matters wherein the Commission is empowered to act and where the rate-making authority of a State is or may be affected by the action taken by the Commission. The Commission is also authorized to avail itself of the cooperation, services, records, and facilities of such State authorities in the enforcement of any provision of this Act.

"(4) Whenever in any such investigation the Commission, after full hearing, finds that any such rate, fare, charge, classification, regulation, or practice causes any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce, which is hereby forbidden and declared to be unlawful, it shall prescribe the rate, fare, or charge, or the maximum or minimum, or maximum and minimum, thereafter to be charged, and the classification, regulation, or practice thereafter to be observed, in such manner as, in its judgment, will remove such advantage, preference, prejudice, or discrimination. Such rates, fares, charges, classifications, regulations, and practices shall be observed while in effect by the carriers parties to such proceeding affected thereby, the law of any State or the decision or order of any State authority to the contrary notwithstanding."

[5] In presenting these amendments to the Committee of the Whole House, Mr. Esch, Chairman of the Committee on Interstate and Foreign Commerce of the House of Representatives, said:

basis for the conclusion that it was the purpose of Congress to interdict a state rate, otherwise lawfully established for transportation exclusively intrastate, before appropriate action by the Interstate Commerce Commission. On the contrary, Congress sought to provide a more satisfactory administrative procedure which would

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"We also provide for the enactment into law of what is popularly known as the decisions of the Supreme Court in the Shreveport case. Where intrastate rates constitute an undue burden, advantage, preference or prejudice against interstate rates, such rates are declared to be unlawful. We have incorporated into law the decision of the court. When by reason of the low level of the intrastate rates an undue burden is cast upon the interstate traffic the citizens and the shippers of other States are compelled to pay higher interstate freight rates than they would have had to pay had that State enacted or put into force and effect proper intrastate rates. We give this power of determination to the Interstate Commerce Commission, but in order that the State commissions may have a proper hearing we provide that the State commissions may, to use a phrase of the street, 'sit in' with the Interstate Commerce Commission. It can sit with the Interstate Commerce Commission; it can hear the testimony, and can present its full case, through its legally constituted authority. It can present the full case, but the final adjudication is to rest with the Interstate Commerce Commission and not with the State regulatory body. We believe that this getting together of the interstate and State regulatory bodies will lessen the number of Shreveport cases, better the feeling between the interstate and the State commissions, and promote the commercial interests of the country." Cong. Rec., 66th Cong., 1st Sess., Vol. 58, pt. 8, p. 8317.

Senator Cummins, Chairman of the Committee on Interstate Commerce of the Senate, made the following statement to the Committee of the Whole of the Senate:

"I need not follow that case" (the Shreveport case) "in all its phases; but it finally reached the Supreme Court of the United States, and the Supreme Court held that the authority of the Federal Government as it could be vested in the Interstate Commerce Commission extended to the removal of a discrimination between the interstate rates and the intrastate rates, but no authority had been given by Congress to the commission to declare what the intrastate rate should be in comparison with the interstate rate. . . .

elicit the coöperation of the State regulatory bodies, and insure a full examination of all the questions of fact which such bodies might raise, before any finding was made in such a case as to unjust discrimination against interstate commerce or any order was entered superseding the rate authorized by the State. In sustaining the authority of the Commission under Section 13 as thus amended, the Court said in *Railroad Commission of Wisconsin* v. *Chicago, Burlington & Quincy Railroad Company* (257 U. S. 563, 590, 591): "It is said that our conclusion gives the Commission unified control of interstate and intrastate commerce. It is only unified to the extent of maintaining efficient regulation of interstate commerce under the paramount power of Congress. It does not involve general regulation of intrastate commerce. Action of the Interstate Commerce Commission in this regard should be directed to substantial disparity which operates as a real discrimination against, and obstruction to, interstate commerce, and must leave appropriate discretion to the

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"The committee has attempted simply to express the decisions of the Supreme Court of the United States. We have not attempted to carry the authority of Congress beyond the exact point ruled by the Supreme Court in the cases to which I have referred; and the only thing we have done in the matter has been to confer upon the Interstate Commerce Commission the authority to remove the discrimination when established in a proper proceeding before that body—an authority which it does not now have. . . .

"The Supreme Court held that Congress had not conferred upon the Interstate Commerce Commission the right to prescribe a rate in the stead of one which had been condemned; but so far as the condemnation of the rates is concerned, the power of the Interstate Commerce Commission is already ample, and it has succeeded in one way or another in removing the discriminations which have come under its notice without the statute which we now propose." Cong. Rec., 66th Cong., 2d Sess., Vol. 59, pt. 1, pp. 142, 143.

state authorities to deal with intrastate rates as between themselves on the general level which the Interstate Commerce Commission has found to be fair to interstate commerce." See *Arkansas Railroad Commission* v. *Chicago, R. I. & P. R. R. Co., supra.*

When, before the amendments of 1910 of the Interstate Commerce Act, the question arose as to the propriety of judicial action in granting injunctions against the maintenance of interstate rates, filed and published by carriers as provided by law, pending the decision of the Interstate Commerce Commission whether such rates were unreasonable or unjustly discriminatory, there was a conflict of opinion in the lower Federal courts, but the weight of decision was that such relief, although temporary in character, could not be granted prior to an appropriate finding by the Interstate Commerce Commission, and this ruling accorded with the principle declared by this Court in the *Abilene* and other cases, *supra*.[6] Congress, in 1910, authorized the Interstate Commerce Commission, on the filing of rates by interstate carriers with the Commission, to suspend the operation of the rates for a stated period, and this provision has been continued in later legislation. Interstate Commerce Act, Sec. 15 (7); 36 Stat. 552; 41 Stat. 486, 487. This power of suspension was entrusted to the Commission only. There

[6] See *Atlantic Coast Line R. R. Co.* v. *Macon Grocery Co.*, 166 Fed. 206; *Columbus Iron & Steel Company* v. *Kanawha & M. Ry. Co.*, 178 Fed. 261; *Wickwire Steel Company* v. *New York Central R. R. Co.*, 181 Fed. 316. Compare *Jewett Bros.* v. *Chicago, M. & St. P. Ry. Co.*, 156 Fed. 160; *Kiser Company* v. *Central of Georgia R. R. Co.*, 158 Fed. 193; 236 Fed. 573; *Northern Pacific R. R. Co.* v. *Pacific Coast Lumber Mfrs. Assn.*, 165 Fed. 1; *Great Northern Ry. Co.* v. *Kalispell Lumber Co.*, 165 Fed. 25.

is no similar provision for the suspension of intrastate rates established by state authority.

It is said that the interlocutory injunction, granted below, was in aid of the proceedings pending before the Interstate Commerce Commission. But the injunction necessarily has the effect of preventing the State from enforcing the rates it has prescribed, which are lawful rates until the Interstate Commerce Commission finds that they cause an unjust discrimination against interstate commerce. A judicial restraint of the enforcement of intrastate rates, although limited to the pendency of proceedings before the Interstate Commerce Commission, is none the less essentially a restraint upon the power of the State to establish rates for its internal commerce, a power the exercise of which in prescribing rates otherwise valid is not subject to interference upon the s ground of injury to interstate commerce, save as Congress has validly provided. Congress has so provided only in the event that, after full hearing in which the State authorities may participate, the Interstate Commerce Commission finds that unjust discrimination is created. Congress forbids the unjust discrimination through the fixing of intrastate rates but entrusts the appropriate enforcement of its prohibition primarily to its administrative agency.

It is urged that the restraining power of the Court is needed to prevent irreparable injury. But, in this class of cases, the questions whether there is injury, and what the measures shall be to prevent it, is committed for its solution preliminarily to the Interstate Commerce Commission.

For these reasons, the order of the District Court is reversed and the cause remanded with direction to dismiss the bill of complaint.

It is so ordered.

Syllabus.

CORPORATION COMMISSION OF OKLAHOMA ET AL. *v.* LOWE, DOING BUSINESS UNDER THE TRADE NAME OF CAPITOL HILL GIN COMPANY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF OKLAHOMA.

No. 454. Argued April 29, 1930.—Decided May 19, 1930.

1. One who attacks a state law under the equal protection clause of the Fourteenth Amendment must show clearly that it creates against him the discrimination complained of. P. 438.
2. It is to be presumed that the State, in enforcing its local policies, will conform to the requirements of federal guaranties; and doubts on this point are to be resolved in favor of the State. *Id.*
3. An individual, licensed to operate cotton gins in Oklahoma, sought to enjoin a state commission from issuing to a farmers' coöperative company a license to gin cotton in his locality, claiming that inasmuch as the cotton-ginning business is regulated by Oklahoma as a public utility, including the rates chargeable, he would be inhibited from reducing his rates indirectly by returning any part of his earnings to his customers, whereas the company, in virtue of the Act under which it was incorporated, was expressly authorized to distribute a portion of its net earnings among those who would deal with it, whether coöperative members or not, in proportion to their dealings, and would thus be allowed an unreasonable, discriminatory advantage in the same line of competitive business, contrary to the equal protection clause of the Fourteenth Amendment. *Held* that, as the plaintiff adduced no law or regulation of the State denying him the privilege of distributing net earnings to patrons upon the basis and in a manner similar to that allowed to the corporation, and as the counsel for the Commission stated at the oral argument that he knew of no such law or regulation, the statute with respect to distribution of net earnings must be regarded as a declaration that such a distribution among patrons of cotton gins is in accord with the policy of the State, and, until the contrary appears, it must be assumed that in giving effect to such policy the State will not permit injurious and unreasonable

discrimination, leaving to the plaintiff his appropriate remedy if discrimination should be practiced in the future. P. 437.

Reversed.

APPEAL from a decree of the District Court permanently enjoining the Corporation Commission from granting a cotton-ginning license.

Messrs. S. P. Freeling and *E. S. Ratliff* for appellants.

Mr. Robert M. Rainey, with whom *Messrs. Streeter B. Flynn* and *Alger Melton* were on the brief, for appellee.

MR. CHIEF JUSTICE HUGHES delivered the opinion of the Court.

This suit was brought by the appellee, William Lowe, to restrain the Corporation Commission of Oklahoma from issuing a license to the Farmers Union Coöperative Gin Company to construct and operate a cotton gin at Packingtown, Oklahoma. The appellee operates a cotton gin at Capitol Hill, Oklahoma City, under a license issued by the Corporation Commission, and the ground of the suit was that the issuing of a license to the Farmers Union Coöperative Gin Company, in view of the privileges with which that company would be able to operate under the applicable statute of Oklahoma, would constitute an injurious invasion of the appellee's business and an unreasonable discrimination against him, thus depriving him of his property without due process of law and denying him the equal protection of the laws in violation of the Fourteenth Amendment of the Federal Constitution.

The District Court, composed of three judges, entered a final decree granting a permanent injunction against the issuing of the license, and the defendants in the suit, the Corporation Commission and the Farmers Union Coöperative Gin Company, have brought this appeal.

Upon the hearing in the District Court there was an agreed statement of facts, from which it appears that the appellant company is a domestic corporation of Oklahoma, organized under Article XIX of Chapter 34, Compiled Statutes of Oklahoma of 1921; that the company filed with the Corporation Commission an application for a license to operate a cotton gin as a public utility at Packingtown, a part of Oklahoma City; that the place where it was proposed to locate the gin is about two and one-half miles from appellee's gin at Capitol Hill; that the appellee also operates a cotton gin at Wheatland, Oklahoma, about ten miles from the proposed site of the gin of the appellant company; and that these gins of the appellee and of the appellant company would be in the same cotton producing territory and would be in competition. It was also agreed that the appellee had filed with the Corporation Commission his written protest against the granting of the license to the appellant company; that the Corporation Commission had heard the application and considered the objection, and that unless restrained by the court the Corporation Commission would issue the license to the appellant company and its proposed gin would be put in operation.

The bill of complaint alleged that cotton gins are public utilities under the law of Oklahoma and that the Corporation Commission is vested with authority to regulate them and to fix the rates, charges, and rules to be observed in their operation. There is no controversy upon these points. The dispute grows out of the privileges accorded by statute to the appellant company as a corporation formed to conduct business upon a coöperative plan. Compiled Statutes of 1921, secs. 5637-5652, as amended in 1923. The particular statutory provision involved is found in section 5648, as follows:

"Dividends and profits—reserve fund. The directors, subject to revision by the stockholders, at any general or

special meeting lawfully called, shall apportion the net earnings and profits thereof from time to time at least once in each year in the following manner:

"(1) Not less than ten per cent thereof accruing since the last apportionment shall be set aside in a surplus or reserve fund until such fund shall equal at least fifty per cent of the paid up capital stock.

"(2) Dividends at a rate not to exceed eight per cent per annum, may, in the discretion of the directors, be declared upon the paid up capital stock. Five per cent may be set aside for educational purposes.

"(3) The remainder of such net earnings and profits shall be apportioned and paid to its members ratably upon the amounts of the products sold to the corporation by its members, and the amounts of the purchases of members from the corporation: provided, that if the by-laws of the corporation shall so provide the directors may apportion such earnings and profits in part to nonmembers upon the amounts of their purchases and sales from or to the corporation."

The precise contention of the appellee is that under this statute, if a license is granted to appellant company, it will be able to carry on its business on more favorable terms than are available to the appellee, since, it is said, it "will be compelled, although engaged in a regulated public business as a public utility, to grant refunds and rebates to its patron members and will have the right and privilege of making such refunds and rebates to non-member patrons upon the amount of their patronage." The appellee argues that he is prohibited from making refunds and rebates, and is compelled, in the performance of his public duty, to charge rates fixed by the Corporation Commission, which will compel him to compete with appellant gin company upon unequal terms."

In *Frost* v. *Corporation Commission of Oklahoma*, 278 U. S. 515, the Court concluded that one who had complied with the statutes of Oklahoma and had obtained a permit to operate a cotton gin, held a franchise which constituted a property right, and that while this right did not preclude the State from making similar valid grants to others, it was an exclusive right as against attempts to operate a competing gin without a permit or under a void permit. In this view, it was decided that a state statute which permitted an individual to engage in such a business only upon his first showing a public necessity, but allowed a corporation to engage in the same business, in the same locality, without such a showing, discriminated against the individual in violation of the equal protection clause of the Fourteenth Amendment. The appellee invokes the principle of this decision upon the ground that in the present case he will be subject, under the state law, to an unjustifiable discrimination in the competition which will ensue if a license is granted to the appellant company.

The appellants take issue with this contention. They urge, in substance, that at best the appellee's complaint is premature, that he has not yet suffered, and does not know that he will suffer, any injury as a result of the statutory provision of which he complains. But if the appellant company, by virtue of the statute, is placed on a more favorable basis in the conduct of its business, by being able to hold out to its patrons the prospect of returns which the appellee by reason of the law binding upon him cannot offer to his patrons, it is apparent that the injury of this discrimination may be inflicted at the outset.

Assuming that the complaint is not premature in this respect, and that the discrimination, if it exists under the law, would be immediately effective, we are brought to

the question whether the appellee is prevented by the law of Oklahoma from offering, and actually making, a distribution of profits to his patrons similar to that permitted by the statute in the case of the appellant company. The appellee is an individual, transacting business as such, as his bill of complaint shows, and he is not bound by provisions governing corporate organization. He must conduct the business of cotton ginning in conformity with the law of the State, but he may deal with the profits of that business as he sees fit, if he does not act contrary to that law. The question is not as to the mere economic advantage or disadvantage to an individual owner of a cotton gin of a distribution of net earnings upon a basis similar to that permitted by the statute in the case of the appellant company, or of the mere disinclination of an individual owner to make such a distribution. The question is whether the appellant company has a privilege under the statute in this respect which the law of the State refuses to the appellee and hence the appellee is denied the equal protection of the laws.

The statutes of Oklahoma characterize the business of cotton ginning as a "public business," and provide that the Corporation Commission "shall have the same power and authority and be charged with the duty of regulating and controlling such cotton gins in all matters relating to the performance of public duties and the charges therefor, and correcting abuses and preventing unjust discrimination and extortion, as is exercised by said Commission as to transportation and transmission companies and shall have the same power to fix rates, rules, charges and regulations to be observed by such person or persons, or corporation, operating gins, and the affording of all reasonable conveniences, facilities and service as it may impose as to transportation or transmission companies." Com-

piled Statutes of Oklahoma of 1921, secs. 3712, 3715, as amended. Under this authority, the Corporation Commission establishes rates and charges for the ginning of seed cotton, and it is agreed that these rates are applicable to all engaged in the cotton ginning business for the general public. There is no basis for an assumption that there will be any difference in rates and charges as applied to the appellee and the appellant company for similar services.

With respect to the distribution of net earnings, the Corporation Commission and the appellant company have argued "that there is no law in the State of Oklahoma against rebates," and, further, that the so-called "patronage dividend," or a ratable distribution of net earnings to patrons upon the basis of their purchases and sales, as contemplated by the statute in question, "is not a rebate as embraced within any definition of the word as heretofore used." Apart from terminology, the important point is whether, under the law of Oklahoma, appellee may do in his business what the appellant is permitted to do, in distributing net earnings. The appellants, both the Corporation Commission and the company, say that he may.

The question was distinctly raised upon the oral argument of the present case before this Court. Not only was the appellee unable to bring to our attention any provision of the law of the State, or any regulation of the Corporation Commission, denying to the appellee the privilege of distributing net earnings to his patrons upon the basis of purchases and sales in a manner similar to that provided in the statute relating to the appellant company, but the counsel for the Corporation Commission in response to direct inquiry stated to the Court that he knew of no such provision of law or regulation of the

Corporation Commission. See *Clark* v. *Poor,* 274 U. S. 554, 557, 558.

It was incumbent upon the appellee in invoking the protection of the Fourteenth Amendment to show with convincing clarity that the law of the State created against him the discrimination of which he complained. An infraction of the constitutional provision is not to be assumed. On the contrary, it is to be presumed that the State in enforcing its local policies will conform its requirements to the Federal guarantees. Doubts on this point are to be resolved in favor of, and not against, the State. *Grenada County Supervisors* v. *Brogden,* 112 U. S. 261, 269; *St. Louis, Southwestern Railway Company* v. *Arkansas,* 235 U. S. 350, 369; *Hendrick* v. *Maryland,* 235 U. S. 610, 621; *Pullman Company* v. *Richardson,* 261 U. S. 330, 340; *South Utah Mines* v. *Beaver County,* 262 U. S. 325, 331.

In the present instance, the authority given to the appellant company by the statute with respect to the distribution of net earnings may be regarded as a declaration that such a distribution of net earnings among patrons of cotton gins is not contrary to, but in accord with, the policy of the State, and, until the contrary appears, the assumption must be that in giving effect to its policy, the State will not permit an injurious and unreasonable discrimination. If, hereafter, in the regulation of his business, the appellee is subject to such a discrimination in violation of his constitutional rights, he will have his appropriate remedy.

The decree of the District Court is reversed and the cause remanded with direction to dismiss the bill of complaint.

It is so ordered.

CINCINNATI *v.* VESTER.

SAME *v.* RICHARDS ET AL.

SAME *v.* REAKIRT.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

Nos. 372, 373, and 374. Argued April 17, 21, 1930.—Decided May 19, 1930.

1. In considering the application of the Fourteenth Amendment to cases of expropriation of private property, the question what is a public use is a judicial one. P. 446.
2. Under Art. XVIII, § 10, of the Ohio Constitution, which provides that a municipality in appropriating property for a public use may "in furtherance of such public use" appropriate an excess over that actually to be occupied by a proposed improvement, and under § 3679, General Code of Ohio, which requires that in the making of an appropriation there shall be a resolution of the municipal council "defining the purpose of the appropriation" etc., a condemnation of private land in excess of that taken for widening a street can not be sustained where its purpose is stated in the resolution only as being "in furtherance" of the widening of the street and "necessary for the complete enjoyment and preservation of said public use," and where a like general, but no specific, explanation of purpose is in the ordnance providing for the excess appropriation. P. 447.
3. The power conferred on a municipal corporation to take private property for public use must be strictly followed. P. 448.
4. This Court will not decide important constitutional questions unnecessarily or hypothetically. P. 448.
5. Questions relating to the constitutional validity of an excess condemnation by a city should not be determined upon conjecture as to the contemplated purposes when the object of the excess appropriation is not set forth as required by the local law. P. 449.

33 F. (2d) 242, affirmed.

CERTIORARI, 280 U. S. 545, to review decrees affirming permanent injunctions awarded by the District Court in suits by owners of land in Cincinnati to restrain appropriations by the City.

Messrs. John D. Ellis, City Solicitor of Cincinnati, and *Ed. F. Alexander,* Assistant City Solicitor, for petitioner.

Mr. John Weld Peck, with whom *Messrs. Milton Sayler* and *Frank H. Shaffer, Jr.,* were on the brief, for respondents.

Messrs. Gilbert Bettman, Attorney General of Ohio, and *L. F. Laylin,* by special leave of Court, filed a brief as *amici curiæ,* on behalf of the State of Ohio.

Messrs. Hamilton Ward, Attorney General of New York, and *Henry S. Manley,* Assistant Attorney General, by special leave of Court, filed a brief as *amici curiæ,* on behalf of the State of New York.

MR. CHIEF JUSTICE HUGHES delivered the opinion of the Court.

These three cases were heard together. The suits were brought by owners of land in the City of Cincinnati to restrain the appropriation of their property by the City, upon the grounds that the taking was not in accordance with the applicable provisions of the constitution and statutes of Ohio and would constitute a deprivation of property without due process of law in violation of the Fourteenth Amendment, it being alleged that the appropriation was not for a public use. Under the law of Ohio these questions could be raised only by injunction proceedings. *P. C. C. & St. L. Railway Co.* v. *Greenville,* 69 O. S. 487, 496; *Sargent* v. *Cincinnati,* 110 O. S. 444. Decrees in favor of plaintiffs for a permanent injunction

were entered in the District Court and were affirmed by the Circuit Court of Appeals. 33 F. (2d) 242. This Court granted writs of certiorari, 280 U. S. 545.

The immediate purpose of the City of Cincinnati in the condemnation proceedings was the widening of Fifth Street, one of the principal thoroughfares of the City. A resolution of the City Council, passed July 6, 1927, declared its intention to appropriate for this purpose a strip of land 25 feet in width, adjacent to the south side of Fifth Street, and no question is raised as to the validity of the appropriation of this strip.

The controversy relates to what is known as "excess condemnation," that is, the taking of more land than is needed to be occupied by the improvement directly in contemplation. The constitution of Ohio provides (Article XVIII, Section 10):

"A municipality appropriating or otherwise acquiring property for public use may in furtherance of such public use appropriate or acquire an excess over that actually to be occupied by the improvement, and may sell such excess with such restrictions as shall be appropriate to preserve the improvement made. Bonds may be issued to supply the funds in whole or in part to pay for the excess property so appropriated or otherwise acquired, but said bonds shall be a lien only against the property so acquired for the improvement and excess, and they shall not be a liability of the municipality nor be included in any limitation of the bonded indebtedness of such municipality prescribed by law."

In this instance, the City proposes to appropriate property in excess of that actually to be occupied by the widened street, and this excess condemnation embraces the following properties of the plaintiffs:

The Vester property. This is a lot, with a three story brick residence, on Broadway, a street intersecting Fifth Street. The lot is 27 feet wide by 90 feet deep running

parallel to Fifth Street. It lies 44 feet south of Fifth Street and is thus 19 feet south of the 25-foot strip taken for the street widening. No part of this property is taken for the 25-foot strip or abuts on the widened street, and the entire lot is sought to be appropriated in the proceeding for excess condemnation. Between the Vester property and the 25-foot strip is the lot of another owner.

The Richards property. This is a leasehold of an improved lot 23 feet wide running from Fifth Street 100 feet through to Buchanan Street, which is parallel to Fifth Street on the south. It is held by the plaintiffs, Richards, with privilege of purchase. The north 25 feet of this lot is taken as a part of the strip for the widened street, and the remaining 75 feet to Buchanan Street is sought to be taken in excess condemnation.

The Reakirt property. This is a tract at the corner of Fifth Street and Sycamore Street (an intersecting street), 138 feet on the south side of Fifth Street and 149 feet on the west side of Sycamore Street. The tract, which is vacant except for a small gasoline filling station, embraces several lots, two of which are not contiguous to the 25-foot strip.

Among the statutory provisions of Ohio relating to the condemnation of property by municipal corporations is the following with respect to the declaration of the purpose of the appropriation (General Code of Ohio, Section 3679):

"Sec. 3679. Resolution shall be passed. When it is deemed necessary to appropriate property, council shall pass a resolution, declaring such intent, defining the purpose of the appropriation, setting forth a pertinent description of the land, and the estate or interest therein desired to be appropriated. For waterworks purposes and for the purpose of creating reservoirs to provide for a

supply of water, the council may appropriate such property as it may determine to be necessary."

The excess condemnation of the properties in question is proposed by the resolution adopted by the City Council, but the purpose of the appropriation is stated in the resolution only in the most general terms as being "in furtherance of the said widening of Fifth Street" and "necessary for the complete enjoyment and preservation of said public use." The ordinance providing for the excess appropriation was not more specific, declaring simply that it is "in furtherance of the public use," described as the widening of Fifth Street, and "for the more complete enjoyment and preservation of the benefits to accrue from said public use." In what way the excess condemnation of these properties was in furtherance of the widening of the street, and why it was necessary for the complete enjoyment and preservation of the public use of the widened street are not stated and are thus left to surmise.

The plaintiffs alleged in their bills of complaint that the excess condemnation is "a mere speculation upon an anticipated increase in the value of the properties adjacent to said improvement," and that the properties were taken "with the design of reselling the same at a profit to private individuals to be used for private purposes, and no use of said property by or for the public is intended or contemplated." The answers of the City denied these allegations and summed up the position of the City by saying that the application of the principle of excess condemnation in these cases would enable the City (1) "to further the appropriate development of the south side of Fifth Street" by using or disposing of the excess properties in tracts "with such size and with such restrictions as will inure to the public advantage," and (2) that the increase in value of the properties in question which may accrue by reason of the improvement contemplated by the

City "will pay in part the very heavy expense to which the City will be put in effecting the improvement."

On the hearing in the District Court, the plaintiffs and the defendant introduced evidence as to the condition and the value of plaintiffs' properties. There was also a stipulation of evidence as to the amount of money available for the street widening, the expense of the appropriation of the 25-foot strip, and the total expense of the entire proposed appropriation. The stipulation gave a general description of Fifth Street and of the improvements of the squares adjoining the widened street. None of the evidence defined in any specific manner the purpose of the excess condemnation.

The City argues that in resorting to excess condemnation legislative bodies generally have had in view the following three purposes (1) the avoidance of remnant lots, (2) the preservation and amplification of the improvement, and (3) the recoupment of expense from increased values. Both the District Court and the Circuit Court of Appeals concluded that the theory of remnants, and of the protection and preservation of the improvement, were not applicable to the present cases. Both courts considered that the sole purpose of the City was the recoupment by the resale of the properties in question of a large part of the expense of the street widening. In this view, both courts held that the excess condemnation was in violation of the constitutional rights of the plaintiffs upon the ground that it was not a taking for a public use "within the meaning of that term as it heretofore has been held to justify the taking of private property." The Circuit Court of Appeals added that the provision of the constitution of Ohio relating to excess condemnation, *supra*, "would seem to mean in furtherance of the normal use to which the property that is occupied by the improvement is devoted,—here the use and preservation of the street for the purposes of travel,"

and the court held that if the provision means that property may be taken "for the purpose of selling it at a profit and paying for the improvement it is clearly invalid."

In this Court, the City challenges the propriety of the assumption upon which these rulings below were based, that is, that the City was proceeding on the theory of the recoupment of expense by resale of the properties. While contending that this would be a valid purpose under the constitution of Ohio, and would constitute a taking for public use and therefore would be consistent with the Fourteenth Amendment, the City insists that its purpose in the present cases can not thus be delimited. The City calls attention to the general statements in the resolution and ordinance adopted by the City Council and declares that these broad declarations constitute "practically all the evidence which directly shows the purpose of the city." While reference is made to what is said in its pleadings with respect to its position, the argument for the City adds that "obviously an impersonality such as a city cannot very well testify as to what its plans and hopes are." The Court is asked to take judicial notice of certain desirable objects which the City might have in view. The City urges that, when the improvement is completed, the City Council will doubtless be in a position to determine what sized tracts and what kinds of restriction will be best suited for the harmonious development of the south side of Fifth Street. But the City also insists that it may never resell the excess; that it is not compelled to do so by the constitution; that the question is one to be determined in the future; that recoupment can come only from a sale, and that until by some act the City evidences an intent to sell it cannot be said to be proceeding only on a theory of recoupment. The City says that it may preserve the public use in many ways, and that sale with restrictions is one that may hereafter be

chosen, but that there is no warrant upon this record for discarding every possible use in favor of a use by sale that may, among other things, result in a possible recoupment.

We are thus asked to sustain the excess appropriation in these cases upon the bare statements of the resolution and ordinance of the City Council, by considering hypothetically every possible, but undefined, use to which the City may put these properties, and by determining that such use will not be repugnant to the rights secured to the property owners by the Fourteenth Amendment. We are thus either to assume that whatever the City, entirely uncontrolled by any specific statement of its purpose, may decide to do with the properties appropriated, will be valid under both the state and Federal constitutions, or to set up some hypothesis as to use and decide for or against the taking accordingly, although the assumption may be found to be foreign to the actual purpose of the appropriation as ultimately disclosed and the appropriation may thus be sustained or defeated through a misconception of fact.

It is well established that in considering the application of the Fourteenth Amendment to cases of expropriation of private property, the question what is a public use is a judicial one. In deciding such a question, the Court has appropriate regard to the diversity of local conditions and considers with great respect legislative declarations and in particular the judgments of state courts as to the uses considered to be public in the light of local exigencies. But the question remains a judicial one which this Court must decide in performing its duty of enforcing the provisions of the Federal Constitution.[1] In the present in-

[1] *Fallbrook Irrigation District* v. *Bradley*, 164 U. S. 112, 159; *Missouri Pacific Ry. Co.* v. *Nebraska*, 164 U. S. 403, 417; *Madisonville Traction Co.* v. *Saint Bernard Mining Co.*, 196 U. S. 239, 252; *Clark*

stance, we have no legislative declaration, apart from the statement of the City Council, and no judgment of the state court as to the particular matter before us. Under the provision of the constitution of Ohio for excess condemnation when a city acquires property for public use, it would seem to be clear that a mere statement by the council that the excess condemnation is in furtherance of such use would not be conclusive. Otherwise, the taking of any land in excess condemnation, although in reality wholly unrelated to the immediate improvement, would be sustained on a bare recital. This would be to treat the constitutional provision as giving such a sweeping authority to municipalities as to make nugatory the express condition upon which the authority is granted.

To the end that the taking shall be shown to be within its authority, the municipality is called upon to specify definitely the purpose of the appropriation. This is the clear import of the provision of the Ohio statute (Ohio General Code, sec. 3679, *supra*) that the City Council, when it is deemed necessary to appropriate property, shall pass a resolution "defining the purpose of the appropriation." It can not be said that this legislative requirement relates only to the principal appropriation and not to the excess appropriation. It must be deemed to apply, according to its express terms, to every appropriation of private property by a municipality. The importance of the definition of purpose would be even greater in the case of taking property not directly to be occupied by a proposed public improvement than in the case of the latter which might more clearly speak for itself.

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v. *Nash,* 198 U. S. 361, 369; *Strickley* v. *Highland Boy Mining Co.,* 200 U. S. 527, 531; *Hairston* v. *Danville & Western Ry. Co.,* 208 U. S. 598, 606; *Sears* v. *City of Akron,* 246 U. S. 242, 251; *Rindge Company* v. *County of Los Angeles,* 262 U. S. 700, 705; *Old Dominion Land Co.* v. *United States,* 269 U. S. 55, 66.

The general declaration of the resolution of the City Council, and of the ordinance if that may be read with the resolution, for the excess condemnation in the present cases, is plainly not a definition. To define is to limit, and that which is left unlimited, and is to be determined only by such future action as the City may hereafter decide upon, is not defined. The City's contention is so broad that it defeats itself. It is not enough that property may be devoted hereafter to a public use for which there could have been an appropriate condemnation. Under the guise of an excess condemnation pursuant to the authority of the constitutional provision of Ohio, private property could not be taken for some independent and undisclosed public use. Either no definition of purpose is required in the case of excess condemnation, a view of the statute which cannot be entertained, or the purpose of the excess condemnation must be suitably defined. In this view, in the absence of such a definition, the appropriation must fail by reason of non-compliance with statutory authority.

We understand it to be the rule in Ohio, as elsewhere, that the power conferred upon a municipal corporation to take private property for public use must be strictly followed. *Harbeck* v. *Toledo,* 11 Ohio St. 219, 222, 223; *Grant* v. *Village of Hyde Park,* 67 Ohio St. 166, 172, 173; *Farber* v. *Toledo,* 104 Ohio St. 196, 200; *Roosevelt Hotel Building Company* v. *Cleveland,* 25 Ohio App. 53, 63, 64. The validity of the excess condemnation upon the ground of non-compliance with the state law was challenged in the bills of complaint in these suits. The respondents have made the same contention here. The City has not met it by referring us to any decision of the courts of Ohio construing the statute involved or sustaining the excess appropriation in the absence of a definition of purpose. It is an established principle governing the exercise of the jurisdiction of this Court, that it will not decide im-

portant constitutional questions unnecessarily or hypothetically. *Liverpool, New York & Philadelphia Steamship Company* v. *Commissioners of Emigration,* 113 U. S. 33, 39; *Siler* v. *Louisville & Nashville Railroad Company,* 213 U. S. 175, 191, 193; *United States* v. *Delaware & Hudson Company,* 213 U. S. 366, 407. The present cases call for the application of this principle. Questions relating to the constitutional validity of an excess condemnation should not be determined upon conjecture as to the contemplated purpose, the object of the excess appropriation not being set forth as required by the local law.

We conclude that the proceedings for excess condemnation of the properties involved in these suits were not taken in conformity with the applicable law of the State, and in affirming the decrees below upon this ground we refrain from expressing an opinion upon the other questions that have been argued.

Decrees affirmed.

TODOK ET AL. *v.* UNION STATE BANK OF HARVARD, NEBRASKA, ET. AL.

CERTIORARI TO THE SUPREME COURT OF NEBRASKA.

No. 412. Argued April 22, 1930.—Decided May 19, 1930.

Article 6 of the treaty of amity and commerce with Sweden and Norway of July 4, 1827, now in force with Norway, provides that "The subjects of the contracting parties in the respective States may freely dispose of their goods and effects, either by testament, donation or otherwise, in favor of such persons as they think proper." *Held:*

(1) As the text of the original of this provision, found in the Treaty of April 3, 1783, with Sweden, was in French only, the French text is controlling in interpretation. P. 454.

(2) The phrase "goods and effects" (*"fonds et biens"*) includes real estate. *Id.*

(3) While treaties, in sateguarding important rights in the interest of reciprocal beneficial relations, may by their express terms afford a measure of protection to aliens which citizens of one or both of the parties may not be able to demand against their own government, the general purpose of treaties of amity and commerce is to avoid injurious discrimination in either country against the citizens of the other. P. 454.

(4) A state law, later than this treaty, providing for the establishment of homesteads with special exemption from execution and forced sale, and inhibiting conveyances of homestead property by any instrument not joined in by both husband and wife, is not invalidated by the treaty as applied to a citizen of Norway who established such a homestead in that State. P. 455.

118 Neb. 105, reversed.

CERTIORARI, 280 U. S. 546, to review a judgment of the Supreme Court of Nebraska which reversed a judgment setting aside deeds of homestead property.

Mr. Frank E. Edgerton, with whom *Messrs. H. G. Wellensiek, C. C. Fraizer,* and *Norris Brown* were on the brief, for petitioners.

Mr. Walter D. James, with whom *Messrs. Benjamin F. Butler, Earl M. Cline,* and *Frank D. Williams* were on the brief, for respondents.

MR. CHIEF JUSTICE HUGHES delivered the opinion of the Court.

Christian Knudson, a native and citizen of Norway, came to this country in 1868 and settled in Nebraska in 1878. He was never naturalized. He established a homestead on 160 acres of land in Hamilton County, Nebraska, and resided there until he died intestate in August, 1923. His father and mother made their home with him until their death, and his son Knute C. Engen, who came to Nebraska in 1893, also lived with him for a time. The wife of Knudson remained in Norway. In July, 1923, Knudson executed deeds of the homestead to his nieces

and their husbands, and these grantees conveyed the property to the Union State Bank of Harvard, Nebraska.

This suit was brought by the son of Knudson, Knute C. Engen, in the District Court of Hamilton County to cancel the conveyances of the land upon the ground that they were obtained by fraud. The widow of Knudson, Mari Tollefsen Todok, who had not joined in the deeds, was made a defendant. By her cross petition she attacked the conveyances, alleging that the property constituted a homestead in which she had an undivided one-half interest. The other defendants answered her cross petition, and in her reply she set up the right to take the real estate of her deceased husband by virtue of the treaty of amity and commerce between the United States and Norway.

The District Court determined that no fraud had been practiced in obtaining the deeds from Knudson, but that these, and the later conveyances dependent upon them, were void upon the ground that the land was homestead property the title to which remained in Knudson until his death and then descended to his widow and his son. The Supreme Court of the State sustained the decision of the District Court with respect to the issue of fraud, but reversed the judgment upon the ground that, under the treaty with Norway, Knudson was entitled to convey the property and that his grantees took title under his deeds. *Engen* v. *Union State Bank*, 118 Neb. 105. This Court granted a writ of certiorari, 280 U. S. 546.

We are not called upon to decide as to the validity under the homestead law of Nebraska of a deed of the homestead by the husband when the wife is an alien who has never come to this country and made the homestead her home. We accept the decision of the Supreme Court of the State that, aside from the effect of the treaty, Knudson's conveyances were void under the law of the State. That Court, referring to the statutes of Nebraska

as to homestead property, and their application to the present case, said (118 Neb. 111, 112):

"For, if we consider the provisions of section 2819 and section 2832, Comp. St. 1922, as applicable to the subject of the present action, it necessarily follows that certain property within the purview of the treaty before us 'cannot be conveyed . . . unless the instrument by which it is conveyed . . . is executed and acknowledged by both husband and wife,' and also that such property (homestead) 'vests on the death of the person from whose property it was selected, in the survivor, for life, and afterwards in decedent's heirs forever, subject to the power of the decedent to dispose of the same, except the life estate of the survivor, by will.'

"The statutory provisions referred to thus assume the nature of limitations, qualifications, or modifications of the treaty itself, and, if valid, would necessarily change its true construction. Each of these provisions of the legislative enactment must therefore be considered to be *pro tanto* inconsistent with the terms of the controlling treaty properly construed. The conclusion follows that, to the extent inconsistent with the terms of the treaty, the statutory provisions are inoperative. The unquestioned rule of construction requires that the provisions of the treaty must be liberally construed and given full force and effect 'anything in the Constitution or laws of any state to the contrary, notwithstanding.' Therefore, the legal effect of the conveyances executed by Christian Knudson must be determined wholly by the powers conferred on him by treaty, and not by the inconsistent limitations and restrictions prescribed in the Nebraska Homestead Act."

The only question before us is as to the construction of the treaty. The provision invoked is Article 6 of the treaty with Sweden of April 3, 1783 (8 Stat. 60, 64), revived by the treaty with Sweden and Norway of Sep-

tember 4, 1816 (8 Stat. 232, 240) which was replaced by the treaty with Sweden and Norway of July 4, 1827 (8 Stat. 346, 354) now in force with Norway (Sen. Doc., 61st Cong., 2d sess., No. 357, vol. 48 (2 Malloy), p. 1300). This article is as follows:

"The subjects of the contracting parties in the respective States, may freely dispose of their goods and effects either by testament, donation or otherwise, in favour of such persons as they think proper; and their heirs in whatever place they shall reside, shall receive the succession even *ab intestato*, either in person or by their attorney, without having occasion to take out letters of naturalization. These inheritances, as well as the capitals and effects, which the subjects of the two parties, in changing their dwelling, shall be desirous of removing from the place of their abode, shall be exempted from all duty called '*droit de detraction*' on the part of the government of the two States respectively. But it is at the same time agreed, that nothing contained in this article shall in any manner derogate from the ordinances published in Sweden against emigrations, or which may hereafter be published, which shall remain in full force and vigour. The United States on their part, or any of them, shall be at liberty to make respecting this matter, such laws as they think proper."

It was at one time supposed that the phrase "goods and effects" in this article did not cover real property, a construction which was due in some measure to the view that the treaties of the United States could not affect the operation of the laws of the several States of the Union with respect to the inheritance of land. Opinion of Attorney General Wirt, July 30, 1819, 1 Op. A. G. 275. This view of the treaty-making power of the United States is not tenable. *Hauenstein* v. *Lynham*, 100 U. S. 483, 489; *Geofroy* v. *Riggs*, 133 U. S. 258, 266, 267; *Sullivan* v. *Kidd*, 254 U. S. 433; *Nielsen* v. *Johnson*, 279 U. S. 47.

The text of the treaty of 1783 with Sweden was in French only, and the French text is therefore controlling. The phrase "goods and effects" is a translation of the French expression *"fonds et biens."* The French word *"biens"* has a wider significance than the English word "goods" (used by the American translator) and embraces real property. Story observed upon this point: "The term *'biens,'* in the sense of the civilians and continental jurists, comprehends not merely goods and chattels as in the common law, but real estate." Conflict of Laws, chap. 1, sec. 13, *note.* In a note addressed by the Swedish Minister at Washington to the Department of State under date of December 12, 1910, in response to an inquiry by the Secretary of State of the United States, the Swedish Minister stated his understanding that the authorities in Sweden had always held that the words "goods and effects" in article 6 of the treaty of 1783 include real estate. This view has been taken in judicial decisions in this country. *Adams* v. *Akerlund,* 168 Ill. 632; *Erickson* v. *Carlson,* 95 Neb. 182. We think that it is the correct construction of the article of the treaty, applying the fundamental principle that treaties should receive a liberal interpretation to give effect to their apparent purpose. *Geofroy* v. *Riggs, supra; Tucker* v. *Alexandroff,* 183 U. S. 424, 437; *Jordan* v. *Tashiro,* 278 U. S. 123, 128; *Nielsen* v. *Johnson, supra.*

The question remains whether the treaty operates to override the law of the State as to the disposition of homestead property. If so, it would appear to place an alien owner of a homestead in Nebraska on a better footing than that of a citizen of the State. This conclusion seems to us to be repugnant to the purpose of the treaty. While treaties, in safeguarding important rights in the interest of reciprocal beneficial relations, may by their express terms afford a measure of protection to aliens which citizens of one or both of the parties may not be

able to demand against their own government, the general purpose of treaties of amity and commerce is to avoid injurious discrimination in either country against the citizens of the other. Compare *Frederickson* v. *Louisiana*, 23 How. 445, 447; *Geofroy* v. *Riggs, supra; Maiorano* v. *Baltimore & Ohio R. R. Co.*, 213 U. S. 268; *Patsone* v. *Pennsylvania*, 232 U. S. 138; *Petersen* v. *Iowa*, 245 U. S. 170; *Duus* v. *Brown*, 245 U. S. 176; *Sullivan* v. *Kidd, supra.* This purpose is indicated in the recital of the treaty of 1783 with Sweden that the high contracting parties thought that they could not better accomplish the end they had in view "than by taking for a basis of their arrangements the mutual interest and advantage of both nations, thereby avoiding all those burthensome preferences, which are usually sources of debate, embarrassment and discontent."

It is not to be supposed that the treaty intended to secure the right of disposition in any manner whatever regardless of reasonable regulations in accordance with the property law of the country of location, bearing upon aliens and citizens alike. For example, conveyances of land would still be subject to non-discriminatory provisions as to form or recording. Nor can the right to "dispose," secured by the treaty, be deemed to give a wholly unrestricted right to the alien to acquire property, without regard to reasonable requirements relating to particular kinds of property and imposed upon both aliens and citizens without discrimination.

It is true that the policy of Nebraska with respect to the selection of homesteads was established after the treaty in question was made. (General Laws, Nebraska, 1879, pp. 57, *et seq.*) But we find no ground for the conclusion that in establishing this reasonable policy Nebraska took any action which was inconsistent with the provisions of the treaty. The citizens of Norway and Sweden who settled in Nebraska had no reason to com-

plain of that policy and had obtained no right to ignore it. The homestead property under the law of Nebraska has a special quality. It is exempt from judgment liens and from executions or forced sale, except as specially provided (Nebraska, Comp. St. 1922, sec. 2816). The acquisition of the homestead with these incidents depends upon the *bona fide* intention to make it a home. *Hair* v. *Davenport*, 74 Neb. 117. It is because of this quality that it enjoys special privileges, and that it cannot be conveyed or encumbered unless the instrument is executed and acknowledged by both husband and wife.

When Knudson selected the homestead, he sought the advantages of the provisions of the local law as to homesteads, and he could not properly obtain the benefits of these provisions without accepting the property with the quality which the law attached to it. If he had not been entitled to establish the homestead, and thus his acquisition lay outside of the homestead law, it would be clear that the statutory provision against disposition of the homestead would have no application and there would have been no occasion for the Supreme Court of the State to cite the provisions of the treaty in order to strike down the prohibition against conveying the property. We are unable to see that anything in the treaty, which was continued in force with Norway, gave Knudson the right to establish a homestead and then hold it free from the restrictions which governed it as a homestead, restrictions which operated upon every citizen of Nebraska who owned a homestead.

Our conclusion is that the treaty did not invalidate the provisions of the Nebraska statute as applied to the present case in relation to the disposition of the land considered as homestead property.

The judgment is reversed and the cause is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

Counsel for Parties.

ELIASON ET AL. *v.* WILBORN ET AL.

APPEAL FROM THE SUPREME COURT OF ILLINOIS.

No. 347. Argued April 28, 29, 1930.—Decided May 19, 1930.

1. Under the Illinois "Torrens" land registration Act, where the owner of registered land entrusts his certificate of title to another person, and the latter, by presenting it, with a forged deed, secures from the Registrar, without notice to the owner, a new certificate of title in himself, and thereafter conveys to a *bona fide* purchaser, purchasing in reliance upon that certificate, such innocent grantee, even after being notified of the fraud, may obtain a valid certificate of title in himself. *Held,* that, so construed, the Act does not deprive the defrauded land-owner of property without due process of law, since the bringing of the land within the provisions of the Act, and subsequent purchases of it subject to those provisions, are purely voluntary. P. 459.
2. As between two innocent persons, one of whom must suffer the consequence of a breach of trust, the one who made it possible by his act of confidence must bear the loss. P. 461.

335 Ill. 352, affirmed.

APPEAL from a judgment of the Supreme Court of Illinois affirming the dismissal of a petition under the state Torrens Act for the cancellation of certain deeds and certificates of title, and for other relief.

Mr. Matthias Concannon, with whom *Mr. Franklin E. Vaughan* was on the brief, for appellants.

Mr. Floyd E. Thompson, with whom *Mr. Henry Jackson Darby* was on the brief, for appellees. *Messrs. J. Scott Matthews* and *Nathan W. MacChesney* also appeared for the appellees.

Mr. J. Scott Matthews, by special leave of Court, filed a brief as *amicus curiæ,* on behalf of Clayton F. Smith, Registrar of Titles of Cook County, Illinois.

MR. JUSTICE HOLMES delivered the opinion of the Court.

The appellants had been holders of a certificate of title under the Torrens Act of Illinois. As a result of negotiations they entrusted this certificate to one Napletone, who is alleged to have presented it together with a forged conveyance to himself to the Registrar and by those means to have obtained from the Registrar a new certificate of title in Napletone, on May 19, 1926. Napletone a few days later sold and conveyed to the Wilborns, appellees, whose good faith is not questioned. After the Wilborns had bought but before a new certificate was issued to them, they had notice of the appellants' claim and the appellants notified the Registrar of the forgery and demanded a cancellation of the deeds and certificates to Napletone and the Wilborns and the issue of a certificate to themselves. The Registrar refused and this petition is brought to compel him to do what the appellants demand. It was dismissed on demurrer by the Circuit Court of the State, and the judgment was affirmed by the Supreme Court. 335 Ill. 352. The Supreme Court construed the statutes as giving title to the Wilborns, who purchased in reliance upon the certificate held by Napletone. Whether we are bound to or not we accept that construction and its result. The petitioners appealed to this Court on the ground that the statute, construed as it was construed below, deprived the appellants of their property without due process of law contrary to the Constitution of the United States, by making the certificate of title issued by the Registrar upon a forged deed without notice to them conclusive against them.

The sections objected to are appended. They are as in the original Act of 1897, except § 40, amended by the laws 1925, p. 250.*

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* Section 40:

"The registered owner of any estate or interest in land brought under this Act shall, except in cases of fraud to which he is a party,

The appellants seem to claim a constitutional right to buy land that has been brought under the Torrens Act free from the restrictions that that Act imposes. But they have no right of any kind to buy it unless the present owner assents, and if, as in this case, the owner from whom the appellants bought, offered and sold nothing except a Torrens title we do not perceive how they can complain that that is all that they got. Even if the restrictions were of a kind that was open to constitutional objection, the appellants bought knowing them and got what they paid

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or of the person through whom he claims without valuable consideration paid in good faith, hold the same subject to the charges hereinabove set forth and also only to such estate, mortgages, liens, charges and interests as may be noted in the last certificate of title in the registrar's office and free from all others except:

(1). Any subsisting lease or agreement for a lease for a period not exceeding five years, where there is actual occupation of the land under the lease. The term lease shall include a verbal letting.

(2) General taxes for the calendar year in which the certificate of title is issued, and special taxes or assessments which have not been confirmed.

(3) Such right of appeal, writ of error, right to appear and contest the application, and action to make counterclaim as is allowed by this Act."

Section 42:

"Except in case of fraud, and except as herein otherwise provided, no person taking a transfer of registered land, or any estate or interest therein, or of any charge upon the same, from the registered owner shall be held to inquire into the circumstances under which or the consideration for which such owner or any previous registered owner was registered, or be affected with notice, actual or constructive, of any unregistered trust, lien, claim, demand or interest; and the knowledge that an unregistered trust, lien, claim, demand or interest is in existence shall not of itself be imputed as fraud."

Section 46:

"The bringing of land under this act shall imply an agreement which shall run with the land that the same shall be subject to the terms of the act and all amendments and alterations thereof. And all dealings with land or any estate or interest therein, after the same

for, and knew that they were liable to lose their title without having parted with it and without being heard. Even if they had been the original holders under the Torrens Act and had attempted to save their supposed rights by protest the answer would be that they were under no compulsion when they came into the system, that an elaborate plan was offered of which the provisions objected to were an important part, and that they could take it as it was or let it alone. There are plenty of cases in which a man may lose his title when he does not mean to. If he entrusts a check indorsed in blank to a servant or friend he takes his chance. So when he entrusts goods to a bailee under some factors' acts that are well known. So, more analogous to the present case, a man may be deprived of a title by one who has none; as when an owner who has conveyed his property by a deed not yet recorded executes a second deed to another person who takes and records the later deed without notice of the former. There are few constitutional rights that may not be waived.

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has been brought under this act, and all liens, incumbrances and charges upon the same, subsequent to the first registration thereof, shall be deemed to be subject to the terms of this act."

Section 47:

"A registered owner of land desiring to transfer his whole estate or interest therein, or some distinct part or parcel thereof, or some undivided interest therein, or to grant out of his estate an estate for life or for a term of not less than ten years, may execute to the intended transferee a deed or instrument of conveyance in any form authorized by law for that purpose. And upon filing such deed or other instrument in the registrar's office and surrendering to the registrar the duplicate certificate of title, and upon its being made to appear to the registrar that the transferee [*sic*] has the title or interest proposed to be transferred and is entitled to make the conveyance, and that the transferee has the right to have such estate or interest transferred to him, he shall make out and register as hereinbefore provided a new certificate and also an owner's duplicate certifying the title to the estate or interest in the land desired to be conveyed

But there is a narrower ground on which the appellants must be denied their demand. The statute requires the production of the outstanding certificate, as a condition to the issue of a new one. The appellants saw fit to entrust it to Napletone and they took the risk. They say that according to the construction of the act adopted the Registrar's certificate would have had the same effect even if the old certificate had not been produced. But that, if correct, is no answer. Presumably the Registrar will do his duty, and if he does he will require the old certificate to be handed in. It does not justify the omission of a precaution that probably would be sufficient, to point out that a dishonest official could get around it. There is not the slightest reason to suppose that Napletone

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to be in the transferee, and shall note upon the original and duplicate certificate the date of the transfer, the name of the transferee and the volume and *folium* in which the new certificate is registered, and shall stamp across the original and surrendered duplicate certificate the word 'canceled.'"

Section 54:

"A deed, mortgage, lease or other instrument purporting to convey, transfer, mortgage, lease, charge or otherwise deal with registered land, or any estate or interest therein, or charge upon the same, other than a will or a lease not exceeding five years where the land is in actual possession of the lessee or his assigns, shall take effect only by way of contract between the parties thereto, and as authority to the registrar to register the transfer, mortgage, lease, charge or other dealing upon compliance with the terms of this act. On the completion of such registration, the land, estate, interest or charge shall become transferred, mortgaged, leased, charged or dealt with according to the purport and terms of the deed, mortgage, lease or other instrument."

Section 58, (omitting immaterial parts):

"In the event of a duplicate certificate of title being lost, mislaid or destroyed, the owner . . . may make affidavit . . . and the registrar, if satisfied as to the truth of such affidavit and the *bona fides* of the transaction, shall issue to the owner a certified copy of the original certificate . . . and such certified copy shall stand in the place of and have like effect as the missing duplicate certificate."

would have got a certificate on which the Wilborns could rely without the delivery of the old one by the appellants. As between two innocent persons one of whom must suffer the consequence of a breach of trust the one who made it possible by his act of confidence must bear the loss.

Decree affirmed.

BARKER PAINTING COMPANY *v.* LOCAL NO. 734, BROTHERHOOD OF PAINTERS, DECORATORS, AND PAPERHANGERS OF AMERICA ET AL.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

No. 477. Argued May 2, 1930.—Decided May 19, 1930.

A bill to enjoin a trade union from calling a strike is properly to be dismissed as moot when, as the result of a preliminary injunction in the suit, the men have continued at work and the job which the bill sought to protect has been completed. P. 463.

34 F. (2d) 3, affirmed.

CERTIORARI, 280 U. S. 550, to review a decree of the Circuit Court of Appeals which affirmed a decree of the District Court dismissing the bill in a suit to enjoin two trade unions and their agents from calling or fomenting a strike. The petitioner here contended that wage rules which the unions sought to enforce against it were unreasonable; that defendants were in a conspiracy illegal at common law, and violative of the public policy of New Jersey, and of the United States as evinced by the Sherman Act, and that the District Court had placed a construction on a New Jersey statute offensive to the Fourteenth Amendment. The opinion of the District Court on interlocutory hearing is in 12 F. (2d) 945.

Mr. Merritt Lane for petitioner.

Mr. Morris Hillquit for respondents.

MR. JUSTICE HOLMES delivered the opinion of the Court.

For the purposes of the present decision this case may be stated as it is stated by the Circuit Court of Appeals. "The Barker Painting Company, a corporation of New York with its home office in New York City, had a contract for painting at Somerville, New Jersey. The job was about thirty per cent completed when the defendant union called off its men by force of the offending rules which require a contractor to pay the wage rate of his home district or that of the locality of the work, whichever is higher. The Barker Company filed the bill in equity in this case stating the facts and alleging unlawfulness of the rules because violative of sundry provisions of the federal constitution and federal laws. The trial Judge issued a preliminary injunction, mandatory in character in that it restrained the workmen from observing the union rules and from not returning to work. All the men save one obeyed the injunction, returned to work and completed the job." This happened before a decision upon the merits by the District Court, April 14, 1926, 12 F. (2d) 945, and a final decree dismissing the bill, March 23, 1928. The Circuit Court of Appeals, while intimating its probable adhesion to its former decision in a similar case, *Barker Painting Co.* v. *Brotherhood of Painters, Decorators and Paperhangers of America*, 15 F. (2d) 16, in accord with the decree below, declined to deal with the merits on the ground that it had become unnecessary to deal with them and for that reason affirmed the dismissal of the bill. 34 F. (2d) 3.

Both sides desired that the Court should go farther afield. But a Court does all that its duty compels when it confines itself to the controversy before it. It cannot be required to go into general propositions or prophetic statements of how it is likely to act upon other possible

or even probable issues that have not yet arisen. See *Willing* v. *Chicago Auditorium Association,* 277 U. S. 274. The controversy here was between the plaintiff and the painters in Somerville who prevented its finishing its job. If the case had needed to be considered on its merits, it would have been likely to involve a discussion more or less far reaching of the powers of the Union, but the plaintiff could not impose a duty to go into that discussion when before the time for it the resistance had been withdrawn and the job had been done.

Decree affirmed.

FEDERAL RADIO COMMISSION *v.* GENERAL ELECTRIC COMPANY ET AL.

CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 122. Argued January 17, 20, 1930.—Decided May 19, 1930.

1. This Court is a constitutional, as distinguished from a legislative, Court, and can have no jurisdiction other than of cases and controversies falling within the classes enumerated in the judiciary article of the Constitution; it cannot give decisions which are merely advisory, nor can it exercise or participate in the exercise of functions which are essentially legislative or administrative. P. 469.
2. A proceeding in the Court of Appeals of the District of Columbia under the Radio Act of 1927, to review an order of the Radio Commission refusing an application for the renewal of an existing license for full time operation of a broadcasting station, is not a case or controversy within the meaning of the judiciary article of the Constitution, but is an administrative proceeding, and the decision therein is not reviewable by this Court. Pp. 466, 470.
3. The action of the Court of Appeals in assessing costs against the Commission did not alter the nature of the proceeding. P. 470.

Certiorari to 31 F. (2d) 630, dismissed.

CERTIORARI, 280 U. S. 537, to review a decision of the Court of Appeals of the District of Columbia, which reversed an order of the Radio Commission refusing an application to renew an existing license for full time operation of a broadcasting station.

Mr. Bethuel M. Webster, Jr., Special Counsel, Federal Radio Commission, *pro hac vice*, by special leave of Court, with whom *Messrs. Paul M. Segal* and *Louis G. Caldwell* were on the brief, for petitioner.

Messrs. Charles Neave, Stephen H. Philbin, and *John W. Guider* were on the brief for the General Electric Company.

Messrs. Hamilton Ward, Attorney General of New York, *Henry S. Manley*, Assistant Attorney General, and *Claude T. Dawes*, Solicitor General, were on the brief for the State of New York.

MR. JUSTICE VAN DEVANTER delivered the opinion of the Court.

A review is sought here of a decision of the Court of Appeals of the District of Columbia given on an appeal from an order of the Radio Commission.

The General Electric Company owned and was operating a broadcasting station at Schenectady, New York, when the Radio Act of 1927 went into effect. Thereafter it sought and obtained from the commission successive licenses under that act for the further operation of the station. The last license was issued November 1, 1927, for that calendar month and was prolonged until November 11, 1928, by successive short extensions.

January 14, 1928, the company made application for a renewal of that license. The application was not acted upon until October 12, 1928, and then the commission ordered that a license be not issued with terms like those of the existing license, but that one be issued with other terms much less advantageous to the company and the communities which it was serving—the chief change being a pronounced reduction in the admissible hours of service. The company regarded this order as a refusal of its application for a renewal of the existing license and prosecuted an appeal, under section 16 of the act of 1927, to the Court of Appeals of the District of Columbia. After a hearing that court found from the record returned by the commission that public convenience, interest and necessity would be served by renewing the existing license without change in its terms, and on that basis held that such a renewal should be granted and that the proceeding should be remanded to the commission with a direction to carry the court's decision into effect. Costs were assessed against the commission. 31 F. (2d) 630. On the petition of the commission certiorari was then granted by this Court.

Our jurisdiction to review the decision of the Court of Appeals is challenged.

The act of 1927, c. 169, 44 Stat., pt. 2, 1162, was enacted as a regulation of interstate and foreign radio communication; and it is in such activities that the company's broadcasting station is used. The act, as amended in 1928, c. 263, 45 Stat. 373, and 1929, c. 701, 45 Stat. 1559, directs that no broadcasting station be used in such communication except in accordance with the act and under a license granted for the purpose; authorizes the Radio Commission to grant station licenses and renewals thereof, both for periods not exceeding three months, and otherwise gives it wide powers in administering the act; restricts the granting of station licenses and renewals to instances "where public convenience, interest or necessity

will be served thereby"; authorizes the commission to determine the question of public convenience, interest or necessity; declares that decisions of the commission in all matters over which it has jurisdiction "shall be final, subject to the right of appeal" therein given; provides (§ 16) that any applicant for a station license or the renewal of such a license, whose application is refused by the commission, may appeal from such decision to the Court of Appeals of the District of Columbia; directs that the grounds of the appeal be stated and the revision be confined to them; requires the commission, where an appeal is taken, to transmit to the court the originals or certified copies of all papers and evidence presented upon the application refused, together with a copy of the commission's decision and a statement of the facts and grounds of the decision; authorizes the court to take additional evidence upon such terms and conditions as it may deem proper; and provides that the court "shall hear, review and determine the appeal upon said record and evidence, and may alter or revise the decision appealed from and enter such judgment as to it may seem just."

We think it plain from this resume of the pertinent parts of the act that the powers confided to the commission respecting the granting and renewal of station licenses are purely administrative and that the provision for appeals to the Court of Appeals does no more than make that court a superior and revising agency in the same field. The court's province under that provision is essentially the same as its province under the legislation which up to a recent date permitted appeals to it from administrative decisions of the Commissioner of Patents.[1] Indeed, the provision in the act of 1927 is patterned largely

[1] Sections 59–62, Title U. S. C. The jurisdiction vested in the Court of Appeals of the District of Columbia by this legislation was transferred to the Court of Customs and Patent Appeals by the Act of March 2, 1929, c. 488, 45 Stat. 1475.

after that legislation. And while a few differences are found, there is none that is material here.

Referring to the provisions for patent appeals this Court said in *Butterworth* v. *Hoe*, 112 U. S. 50, 60, that the function of the court thereunder was not that of exercising ordinary jurisdiction at law or in equity, but of taking a step in the statutory proceeding under the patent laws in aid of the Patent Office. And in *Postum Cereal Company* v. *California Fig Nut Company*, 272 U. S. 693, 698, which related to a provision for a like appeal in a trade-mark proceeding, this Court held: "The decision of the Court of Appeals under § 9 of the act of 1905 [2] is not a judicial judgment. It is a mere administrative decision. It is merely an instruction to the Commissioner of Patents by a court which is made part of the machinery of the Patent Office for administrative purposes." Another case in point is *Keller* v. *Potomac Electric Power Co.*, 261 U. S. 428, 442–444, which involved a statutory proceeding in the courts of the District of Columbia to revise an order of a commission fixing the valuation of the property of a public utility for future rate-making purposes. There this Court held that the function assigned to the courts of the District in the statutory proceeding was not judicial in the sense of the Constitution, but was legislative and advisory, because it was that of instructing and aiding the commission in the exertion of power which was essentially legislative.

In the cases just cited, as also in others, it is recognized that the courts of the District of Columbia are not created under the judiciary article of the Constitution but are legislative courts, and therefore that Congress may invest them with jurisdiction of appeals and proceedings such as have been just described.

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[2] Now § 89, Title 15, U. S. C. This jurisdiction also was transferred to the Court of Customs and Patent Appeals by the act cited in note 1.

But this Court cannot be invested with jurisdiction of that character, whether for purposes of review or otherwise. It was brought into being by the judiciary article of the Constitution, is invested with judicial power only and can have no jurisdiction other than of cases and controversies falling within the classes enumerated in that article. It cannot give decisions which are merely advisory; nor can it exercise or participate in the exercise of functions which are essentially legislative or administrative. *Keller* v. *Potomac Electric Power Co., supra,* p. 444, and cases cited; *Postum Cereal Co.* v. *California Fig Nut Company, supra,* pp. 700–701; *Liberty Warehouse Co.* v. *Grannis,* 273 U. S. 70, 74; *Willing* v. *Chicago Auditorium Association,* 277 U. S. 274, 289; *Ex parte Bakelite Corporation,* 279 U. S. 438, 449.

The proceeding on the appeal from the commission's action is quite unlike the proceeding, under sections 1001 (a)–1004 (b) of the Revenue Act of 1926, c. 27, 44 Stat., pt. 2, 109, on a petition for the review of a decision of the Board of Tax Appeals; for, as this Court heretofore has pointed out, such a petition (a) brings before the reviewing court the United States or its representative on the one hand and the interested taxpayer on the other, (b) presents for consideration either the right of the United States to the payment of a tax claimed to be due from the taxpayer or his right to have refunded to him money which he has paid to satisfy a tax claimed to have been erroneously charged against him, and (c) calls for a judicial and binding determination of the matter so presented—all of which makes the proceeding a case or controversy within the scope of the judicial power as defined in the judiciary article. *Old Colony Trust Co.* v. *Commissioner of Internal Revenue,* 279 U. S. 716, 724–727.

And what is said in some of the cases already cited respecting the nature and purpose of suits to enforce or

set aside orders of the Interstate Commerce Commission, as also orders of the Federal Trade Commission, makes it apparent that the jurisdiction exercised in those suits is not administrative, but strictly judicial, and therefore quite unlike the jurisdiction exercised on appeals from the Radio Commission.

Of course the action of the Court of Appeals in assessing the costs against the commission did not alter the nature of the proceeding.

Our conclusion is that the proceeding in that court was not a case or controversy in the sense of the judiciary article, but was an administrative proceeding, and therefore that the decision therein is not reviewable by this Court.

Writ of certiorari dismissed.

MR. CHIEF JUSTICE HUGHES did not participate in the consideration or decision of this case.

GRUBB *v.* PUBLIC UTILITIES COMMISSION OF OHIO ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

No. 491. Motion to Dismiss or Affirm submitted January 27, 1930.—Decided May 19, 1930.

1. A judgment of the Supreme Court of Ohio, affirmed, upon review under Gen. Code, §§ 544, 545, an order of the State Public Utilities Commission, which, in granting to the appellant a license to operate a line of passenger motor buses within the State, forbade his adding to the route a loop to a point in an adjacent State near the state line and back. *Held* conclusive as *res judicata* in a suit in the federal court, upon the questions whether the prohibition in the order violated rights of the appellant under the commerce clause of the Federal Constitution and under the privileges and immunities clause of the Fourteenth Amendment. P. 475.

2. The state and federal courts have concurrent jurisdiction over civil suits arising under the Constitution and laws of the United States, including the commerce clause, save in exceptional instances where the jurisdiction has been restricted by Congress to the federal courts. P. 475.
3. Where control over specific property is not involved, the fact that suit is begun first in a federal court does not preclude a state court from entertaining a suit involving the same subject and parties. The final judgment first rendered in either case becomes conclusive in the other as *res judicata*. P. 476.
4. In determining the effect of a judgment of a state court as an estoppel in the federal court, the state court's decision as to the jurisdiction intended to be conferred on it by state statutes is conclusive in the District Court and in this Court on appeal. P. 477.
5. A judgment of a state court affirming an order of a state commission over an objection distinctly raised under the Constitution is necessarily an adjudication of the federal question, although that question be not mentioned by the court in its opinion. *Id.*
6. Upon a judicial review attacking the validity of an order of an administrative body, the party attacking must present every available ground of which he has knowledge. He is not at liberty to prosecute his right by piecemeal. P. 478.
7. A judgment upon the merits in one suit is *res judicata* in another where the parties and subject matter are the same, not only as respects matters actually presented to sustain or defeat the right asserted, but also as respects any other available matter which might have been presented to that end. P. 479.

33 F. (2d) 323, affirmed.

APPEAL from a decree of the District Court of three judges dismissing the bill in a suit to enjoin, in part, an order of the Public Utilities Commission of Ohio defining the appellant's right to operate a line of passenger buses.

Messrs. John F. Carlisle, Frank M. Raymund, and *Andrew Wilson* were on the brief for appellant.

Messrs. Gilbert Bettman, Attorney General of Ohio, *T. J. Herbert,* Assistant Attorney General, *A. R. Johnson,* and *D. H. Armstrong* were on the brief for appellees.

MR. JUSTICE VAN DEVANTER delivered the opinion of the Court.

The appellant applied to the Public Utilities Commission of Ohio for a certificate to operate, solely in interstate commerce, a line of passenger motor buses over certain public highways in that State as part of an intended route between Columbus, Ohio, and Huntington, West Virginia. In his application he described the route as including a short loop at Portsmouth, Ohio, whereby the buses on reaching that point would cross the Ohio River to a village at the Kentucky end of the interstate bridge and then recross to Portsmouth before proceeding towards their destination. Several carriers likely to be affected if the application was granted intervened and filed protests. A hearing was had, after which the Commission made an order granting the requested certificate, but excluding the loop at Portsmouth from the intended route—the exclusion being put in the form of an express prohibition,[1] and the commission explaining that in its opinion the loop was intended to be merely a device to enable the appellant to carry passengers between Portsmouth and other points in Ohio and, by giving that service the appearance of an interstate service, to avoid compliance with the laws of that State relating to intrastate motor transportation. A rehearing was sought by the appellant because the loop at Portsmouth was excluded, and by the protestants because the certificate was granted; but the Commission adhered to its order.

The appellant then brought a suit in equity against the Commission in the District Court of the United States for

[1] "Ordered that the said applicant be, and hereby he is, prohibited from incorporating within the regular route, upon which he will herein be granted a certificate to operate within the State of Ohio, any movement which shall provide for the crossing and recrossing of the Ohio River at Portsmouth, Ohio."

the Southern District of Ohio to restrain and prevent the enforcement of so much of the order as excluded from the intended route the loop at Portsmouth. The protestants and some police officers who might be called on to assist in enforcing the order were made codefendants with the Commission. The parties were all citizens of Ohio, and the sole ground advanced for invoking the jurisdiction of the federal court was that the suit was one arising under the Constitution of the United States and involving more than three thousand dollars. See sections 41 (1) and 380, Title 28, U. S. C.

In the bill so much of the order as excluded the loop at Portsmouth was assailed as an attempted restriction and regulation of interstate commerce by a state agency contrary to the commerce clause of the Constitution of the United States and to section 614–101 of the General Code of Ohio, and as denying to the appellant rights, privileges and immunities guaranteed by the Fourteenth Amendment. The prayer was for both an interlocutory and a permanent injunction, to be granted conformably to section 380, Title 28, U. S. C.

Three judges were called pursuant to that section to act in the suit; an interlocutory injunction was granted; and upon the final hearing there was a decree dissolving the injunction and dismissing the bill upon the ground that in a litigation between the same parties, had in the Supreme Court of Ohio while the suit in the District Court was pending, the Commission's order had been adjudged valid, and that the appellant was barred and estopped by that adjudication from further litigating the same matter. 33 F. (2d) 323. After the decree was entered, the appellant sought and the District Court allowed a direct appeal to this Court under sections 345 and 380, Title 28, U. S. C.

The appellees now have interposed a motion, under section 4 of rule 7 of the Rules of this Court, that the

decree be affirmed without awaiting oral argument upon the ground that the objections taken to the decree are so unsubstantial as not to admit of debate; and the parties have submitted full briefs in this connection.

The laws of Ohio make provision for a review of final orders of the Commission by the Supreme Court of the State—a judicial review culminating in a judgment. Gen. Code, §§ 544, 545; *Hocking Valley Ry. Co.* v. *Public Utilities Commission,* 92 O. St. 9, 14; *Hocking Valley Ry. Co.* v. *Public Utilities Commission,* 100 O. St. 321, 323; *Ohio Utilities Co.* v. *Public Utilities Commission,* 267 U. S. 359.

Shortly after the Commission denied their respective applications for a rehearing the appellant and the protestants by two distinct petitions sought and obtained a review of the Commission's order by the Supreme Court of the State—the appellant complaining of the exclusion of the loop at Portsmouth, and the protestants of the granting of the certificate. The Commission was made a party defendant to both petitions, and the petitions were consolidated and heard together. Thus the court had before it the entire order, the Commission, the appellant and the protestants. In that court the appellant charged in his petition that so much of the order as excluded the loop from the intended route was unlawful and should be reversed upon the grounds, among others, that it was not sustained by the evidence, denied to the appellant rights, privileges and immunities guaranteed by the Fourteenth Amendment, was in conflict with the commerce clause of the Constitution of the United States, and was in violation of section 614–101 of the General Code of Ohio. The grounds on which the protestants challenged the order are only obscurely indicated in the present record—possibly because having no bearing here.

After a hearing in which all of the parties participated the state court rendered a judgment sustaining and affirming the Commission's order in its entirety. 119 O. S. 264. No effort was made to have that judgment reviewed by this Court, and after the three months allotted for applying for such a review had elapsed, the defendants in the suit in the District Court, by leave of that court, interposed answers setting up the judgment as a bar to the further prosecution of the suit. A hearing upon this plea resulted in the decree now under review, which sustained the plea and dismissed the bill.

The case in the state court was so far identical with the suit in the federal court as respects subject matter and parties that there can be no doubt that the judgment in the former, unless invalidated by some jurisdictional infirmity, operated to bar the further prosecution of the latter. That the state court had jurisdiction of the parties is plain and not questioned. But the appellant does question that it had jurisdiction of the subject matter—and this although at the outset he treated that jurisdiction as subsisting and invoked its exercise. Of course, he is entitled to raise this question notwithstanding his prior inconsistent attitude, for jurisdiction of the subject matter must arise by law and not by mere consent. We turn therefore to the grounds on which that jurisdiction is questioned.

The appellant relies on the commerce clause of the Constitution as in some way operating to commit to the federal courts and to withhold from the state courts jurisdiction of all suits relating to the regulation or attempted regulation of interstate commerce. This view of that clause is quite inadmissible. It has no support in any quarter, is at variance with the actual practice in this class of litigation, *Gibbons* v. *Ogden,* 9 Wheat. 1; *Western*

Union Telegraph Co. v. *Public Service Commission,* 247 U. S. 105; *Pennsylvania Gas Co.* v. *Public Service Commission,* 225 N. Y. 397; s. c. 252 U. S. 23; *Peoples Gas Co.* v. *Public Service Commission,* 270 U. S. 550; *Public Utilities Commission* v. *Attleboro Co.,* 273 U. S. 83; *Murray* v. *Chicago & Northwestern Ry. Co.,* 62 Fed. 24, 42–43; and is in conflict with the doctrine often sustained by this Court that the state and federal courts have concurrent jurisdiction of suits of a civil nature arising under the Constitution and laws of the United States, save in exceptional instances where the jurisdiction has been restricted by Congress to the federal courts. *Claflin* v. *Houseman,* 93 U. S. 130, 136–137; *Robb* v. *Connolly,* 111 U. S. 624, 635–637; *Second Employers' Liability Cases,* 223 U. S. 1, 56–57; *Minneapolis & St. Louis R. R. Co.* v. *Bombolis,* 241 U. S. 211, 221–223. There is no such restriction which is applicable here.

It next is said that the suit in the federal court was begun before resort was had to the state court, and therefore that the jurisdiction of the federal court was exclusive and precluded action in the state court. In this the appellant is invoking a rule which is applicable to suits dealing with specific property and involving actual or potential control over the same, where necessarily the court (whether federal or state) first obtaining jurisdiction of the *res* must hold it to the exclusion of another. Here the litigation was not of that class, but was of such a nature that it could proceed in both courts, in virtue of their concurrent jurisdiction, until there was a final judgment in one, *Kline* v. *Burke Construction Co.,* 260 U. S. 226, when that judgment would become conclusive in the other as *res judicata. Chicago, Rock Island & Pacific Ry. Co.* v. *Schendel,* 270 U. S. 611, 616; *Insurance Co.* v. *Harris,* 97 U. S. 331, 336.

By way of further questioning the state court's jurisdiction, it is said that the state statutes, rightly under-

stood, do not invest that court with power to review orders of the Commission relating to interstate commerce, but only such as relate to other subjects, sections 502, 614–89, 614–101 of the Ohio General Code being cited. And by way of questioning that court's power to render the judgment in question, it is said that the state statute, section 544, General Code, although distinctly empowering the court to reverse, vacate or modify orders of the Commission found unlawful or unreasonable, contains no provision for an affirmance of those not so found. The powers of the state court in these particulars are questions of local law only. That court resolved them against the present contentions, for it both reviewed and affirmed the order. And that resolution is in accord with its earlier and later rulings. *Cannon Ball Transportation Co.* v. *Public Utilities Commission,* 113 O. S. 565; *Detroit-Cincinnati Coach Line, Inc.* v. *Public Utilities Commission,* 119 O. S. 324; *Wheeling Traction Co.* v. *Public Utilities Commission,* 119 O. S. 481. Plainly its solution of these questions of local law must be accepted as controlling in this Court, as they were in the District Court. *Standard Oil Co.* v. *Missouri,* 224 U. S. 270, 281; *Gasquet* v. *Lapeyre,* 242 U. S. 367, 369; *Iowa Central Ry. Co.* v. *Iowa,* 160 U. S. 389, 393.

In the opinion of the state court there is no express mention of the constitutional grounds on which the appellant asked a reversal of the order excluding the loop over the Ohio River at Portsmouth; and from this it is argued that the constitutional validity of the order was not determined, and therefore as to that matter the judgment is not *res judicata.* But the argument is not sound. The question of the constitutional validity of the order was distinctly presented by the appellant's petition and necessarily was resolved against him by the judgment affirming the order. Omitting to mention that question in the opinion did not eliminate it from the case or

make the judgment of affirmance any the less an adjudication of it. But while the opinion makes no specific reference to the attack on the constitutional validity of the order, it leaves no doubt that the court regarded that and other objections to the order as untenable, and on that basis affirmed it; for in the opinion the court says, "The finding of fact by the commission as to the intent and purpose of Grubb in seeking this side loop from Portsmouth to South Portsmouth and return was amply sustained by the records of the commission, and we see no error in the action of the commission denying that part of the application."

In his bill the appellant assails the validity of the order upon one ground not brought to the attention of the state court—a ground arising out of the granting to another interstate motor line of a certificate to operate buses over a route including the loop at Portsmouth; and he insists that this ground of objection is not concluded by the judgment of the state court, and therefore is open to examination and adjudication upon its merits by the District Court. But the judgment has a broader operation as *res judicata* than is thus suggested. The certificate referred to was granted several months before the appellant applied for a certificate and he had personal knowledge of it from the time it was granted. It was shown upon the records of the Commission and was easily accessible when the hearing was had upon his application. Thus it is a matter which, if having the bearing now suggested, could have been brought to the attention of the Commission either at that hearing or in his request for a rehearing, section 543, General Statutes; and, if it was not then given proper effect, he could have brought it to the attention of the state court and have made the same claim in respect of it that is now made in his bill.

The thing presented for adjudication in the case in the state court was the validity of the order, and it was in-

cumbent on the appellant to present in support of his asserted right of attack every available ground of which he had knowledge. He was not at liberty to prosecute that right by piecemeal, as by presenting a part only of the available grounds and reserving others for another suit, if failing in that. *Werlein* v. *New Orleans,* 177 U. S. 390, 398, *et seq; United States* v. *California and Oregon Land Co.,* 192 U. S. 355, 358.

As the ground just described was available but not put forward the appellant must abide by the rule that a judgment upon the merits in one suit is *res judicata* in another where the parties and subject matter are the same, not only as respects matters actually presented to sustain or defeat the right asserted, but also as respects any other available matter which might have been presented to that end. *Baltimore S. S. Co.* v. *Phillips,* 274 U. S. 316, 319; *United States* v. *Moser,* 266 U. S. 236, 241; *Cromwell* v. *County of Sac,* 94 U. S. 351, 352.

We think it follows from what has been said that the objections taken to the decree below are so unsubstantial that the motion to affirm without awaiting oral argument should be sustained.

Decree affirmed.

PITTSBURGH & WEST VIRGINIA RAILWAY COMPANY *v.* UNITED STATES ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO.

No. 680. Argued April 15, 1930.—Decided May 19, 1930.

1. The fact that a railway company intervened before the Interstate Commerce Commission to oppose the granting to another railway company of a certificate of public convenience and necessity permitting the latter to abandon one of its stations and to use instead the facilities of a terminal established by other carriers, gives the in-

tervening company no standing to bring an independent suit under the Urgent Deficiencies Act of October 22, 1913, to set aside the order of the Commission granting the certificate, in the absence of resulting actual or threatened legal injury to such complainant. P. 486.

2. An independent standing to bring such a suit can not be based upon the fact that the lines of the complaining carrier connect with those of the carrier to which the certificate is granted, where the connection is remote from the point to which the certificate relates and there is no suggestion that the order can affect the complainant as a carrier. *Id.*

3. An independent standing to bring such a suit cannot be grounded upon the proposition that, by acting upon the certificate, the carrier to which it is granted may, through future regulation of the rates of the terminal, incur liabilities threatening to its financial stability and consequently threatening to the financial interest of the complainant as a minority stockholder of such carrier. P. 487.

4. A railway company, as a minority stockholder of another which, pursuant to a certificate granted by the Interstate Commerce Commission, was about to abandon one of its stations and avail itself of other terminal facilities under contracts with other carriers, filed a bill in the District Court, joining the United States, the Commission, the grantee of the certificate and the other carriers, as defendants, and praying (1) that the order granting the certificate be set aside; (2) that the company holding the certificate be enjoined from abandoning its station and performing its contracts upon the ground that its directors held office illegally and, in making the contracts and applying for the certificate, were guilty of a breach of trust and violated the rights of stockholders under the state law. *Held:*

(1) That relief on the second ground, not being ancillary to nor dependent upon the judgment as to the order of the Commission, may not be included in a bill before three judges to set the order aside, but is appropriate only to a suit invoking the plenary equity jurisdiction of the District Court and to be heard in ordinary course by a single judge. *The Chicago Junction Case,* 264 U. S. 258, distinguished. P. 488.

(2) The decree of the District Court as to such general equitable relief is not reviewable in this Court on direct appeal. *Id.*

(3) Grounds for general equitable relief can not give standing in this Court on direct appeal under the Urgent Deficiencies Act to a plaintiff who had no right to bring the suit under that Act. *Id.*

5. A decree dismissing on the merits a bill which should have been dismissed for want of standing in the plaintiff to sue, *affirmed* without prejudice to enforcement of the plaintiff's rights in a proper proceeding. P. 489.

41 F. (2d) 806, affirmed.

APPEAL from a decree of the District Court dismissing a bill to annul an order of the Interstate Commerce Commission and for other equitable relief. The three judge court was of opinion that the grounds of complaint beyond the attack on the order were not properly before it, but, since diversity of citizenship existed and the district judge concurred in the decree, it passed on them and reserved to appellant the right (of which it did not avail itself) to sever those issues for purposes of appeal and treat its decision on them as the decision of a single judge.

Mr. H. H. Hoppe, with whom *Mr. C. F. Taplin* was on the brief, for appellant.

Attorney General Mitchell, Assistant to the Attorney General O'Brian, Messrs. Elmer B. Collins, Special Assistant to the Attorney General, *Daniel W. Knowlton,* Chief Counsel, Interstate Commerce Commission, and *Nelson Thomas* were on the brief for the United States and Interstate Commerce Commission.

Messrs. W. C. Boyle, Clan Crawford, Charles F. Close, and *Andrew P. Martin* were on the brief for the Wheeling & Lake Erie Railway Company.

Messrs. W. H. Boyd, H. H. McKeehan, L. C. Wykoff, Charles W. Stage, and *George William Cottrell* were on the brief for the Cleveland Union Terminals Company and the Cleveland Terminals Building Company.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

In 1921, the Interstate Commerce Commission authorized the New York Central Railroad and other rail car-

riers to join in establishing a union passenger station at Cleveland, through a subsidiary, the Cleveland Union Terminals Company.[1] *The Cleveland Passenger Terminal Case*, 70 I. C. C. 659. The Wheeling & Lake Erie Railway Company had for some years owned and maintained an independent passenger station at Ontario Street in Cleveland in the line of the easterly approach to the proposed union terminal. It was apparent from the outset that either ownership of or an easement in the Wheeling's site would be indispensable in order to provide the necessary easterly approach to the terminal.[2] Long negotiations culminated in a plan whereby the Wheeling consented to sell its site and become a tenant in the new terminal at an annual rental of $20,000. Contracts were made embodying this plan, subject to approval of the Interstate Commerce Commission.[3]

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[1] Application for this authority had previously been dismissed. 70 I. C. C. 342. The Union Terminals Company is owned entirely by the New York Central, the New York, Chicago & St. Louis Railroad Co. (Nickel Plate), and the Cleveland, Cincinnati, Chicago & St. Louis Railway Co. (Big Four).

[2] The land upon which the station was to be constructed was owned by the Cleveland Terminals Building Company. It conveyed the ground to the Terminals Company, reserving the air rights to itself. And it undertook to procure for Terminals an easement in Wheeling's site.

[3] Five contracts were executed by the Wheeling: (a) A contract with the Building Company containing an option to sell the Ontario Street site for $1,600,000; (b) a contract with the Terminals for the use of the union depot; (the provisions of this contract are set out in detail in the report of the Commission); (c) a contract with the Erie Railroad for the temporary use of its Superior Avenue station pending completion of the union terminal; (d) a contract with the Big Four for the temporary use of its tracks in order to reach the Erie's station; (e) a contract with the Terminals for reimbursement by it of the amounts which the Wheeling would have to pay under its contracts with the Erie and the Big Four.

Thereupon, the Wheeling filed before the Commission two applications for certificates of public convenience and necessity, one permitting it to abandon its Ontario Street station,[4] the other authorizing it to use the facilities of the union terminal and, pending its completion, to use the facilities of the station of the Erie Railroad and the tracks of the Big Four. These applications were heard together as one case. The Pittsburgh & West Virginia Railway, a minority stockholder and connecting carrier of the Wheeling, was permitted to intervene and was heard in opposition to the applications. It opposed them on the grounds that the Ontario Street station was ample for both the present and future needs of the Wheeling; that the Wheeling's applications were authorized by directors elected by the votes of stock owned in violation of the Clayton Act by the Baltimore & Ohio Railroad, the New York Central and the Nickel Plate (*Interstate Commerce Commission* v. *Baltimore & Ohio R. R. Co.*, 152 I. C. C. 721); that the contracts executed by the Wheeling were made without first securing the consent of its stockholders, as required by the laws of Ohio; that the Wheeling's directors were interested in the union terminal project and did not give the Wheeling the benefit of their unbiased judgment; that the price to be paid the Wheeling for its site was inadequate and not the best price obtainable; that the Terminals Company is a common carrier whose rates are subject to regulation; that the yearly rental to be paid by the Wheeling is unduly low and unreasonably preferential of the Wheeling; that it is

[4] This authority was also sought from the Public Utilities Commission of Ohio, but the application was dismissed for want of jurisdiction and the order of dismissal was affirmed by the Supreme Court of Ohio. *Pittsburgh & West Virginia Ry. Co.* v. *Pub. Util. Comm.*, 120 O. S. 434. See also *Wheeling & Lake Erie Ry. Co.* v. *Pittsburgh & West Virginia Ry. Co.*, 33 F. (2d) 390.

therefore subject to be increased by the Interstate Commerce Commission; and that, if increased so as to eliminate the preference, it would confessedly be much more than the Wheeling could afford to pay and would imperil its financial condition.

The Commission held that the violation of the Clayton Act was immaterial since the election of the directors occurred prior to the Commission's finding of violation and the finding was not made retroactive; that it lacked jurisdiction to pass upon the alleged violations of Ohio law or upon the adequacy of the price agreed to be paid for the Wheeling's site; that under paragraph (4) of § 3 of the Interstate Commerce Act, the agreed rental for the Wheeling's use of the union station was not subject to be increased by it; and that in view of all the circumstances, the rental was not unduly preferential of the Wheeling. It found that public convenience and necessity would be served by the granting of both applications; and accordingly issued its certificate as prayed for. *Operation of Passenger Terminal Facilities at Cleveland, Ohio, by Wheeling & Lake Erie Ry. Co.*, 154 I. C. C. 516.

The Pittsburgh & West Virginia then brought this suit in the District court for northern Ohio, eastern division. It joined as defendants the Wheeling, the Erie, the Big Four, the Terminals Company, the Building Company, the Interstate Commerce Commission and the United States. The purpose of the suit, as stated in the complaint, was two fold: first, to enjoin the Wheeling from abandoning its Ontario Street station and from performing its contracts with the other defendants; secondly, to set aside and annul the order of the Interstate Commerce Commission granting the certificate of public convenience and necessity. Separate relief was prayed for accordingly. As against the Wheeling, the prayer was founded on the several grounds advanced before the Commission. As against the United States and the Commission, on the

additional ground that the order was based on erroneous conclusions of law; to wit, that the Commission had no jurisdiction to pass on the adequacy of the price to be paid for the land and on the alleged violations of the laws of Ohio; that the Wheeling's directors were competent to act for it in this matter; and that the rental agreed to be paid by the Wheeling for the use of the union terminal facilities was not subject to be increased by the Commission.

The Pittsburgh moved for an interlocutory injunction. As the bill sought to suspend and set aside an order of the Interstate Commerce Commission, the District Judge called to his assistance two additional judges pursuant to the Urgent Deficiencies Act, October 22, 1913, c. 32, 38 Stat. 208, 219-20. By consent of the parties, the case was then heard, as upon final hearing; [5] and the court

[5] When the motion for a preliminary injunction was reached for hearing, the court formally "announced that the hearing, either temporary or as final, would be considered as involving two classes of questions: First, those involving the validity of the order of Interstate Commerce Commission as dependent upon the record before it and thus involving questions of public interest in which the United States and Interstate Commerce Commission are interested; and second, those involving all other grounds of attack upon the proposed action of the defendant [the Wheeling] and in which neither the United States nor the Interstate Commerce Commission was interested; and that the hearing would proceed upon the first class of questions involved; that the court would then decide whether to dispose of the matter upon those questions or to continue the hearing upon the other questions. . . . Thereupon . . . the record of the proceedings and testimony before the Interstate Commerce Commission . . . was received . . . upon the first class of questions, and the extent of its admissibility on the second class . . . reserved until the hearing of that branch of the case." But no further hearings were held. Appellant claimed the right to introduce additional evidence and excepted to the above ruling of the court. Compare *Tagg Bros. & Moorhead* v. *United States*, 280 U. S. 420, 442. Appellant's consent to final submission was subject to the above claims.

entered a final decree dismissing the bill on the merits as to both classes of relief prayed for. It declared, however, that the questions concerning the alleged violation of Ohio law, the competency of the Wheeling's directors and the other grounds of attack on the Wheeling's action were not properly before it as a three judge court. But, since diversity of citizenship existed and the district judge concurred in the judgment, the court passed on them and reserved to appellant the right to sever these issues for purposes of appeal and treat its decision on them as the decision of a single judge. *Pittsburgh & West Virginia Ry. Co.* v. *United States,* 41 F. (2d) 806. Appellant did not avail itself of this privilege but prosecuted a direct appeal to this Court from the whole decree. It repeats here the several grounds of attack urged before the district court. We have no occasion to consider the merits of the controversy. For, we are of opinion that appellant had no standing to bring this suit as one to set aside an order of the Commission; and that, insofar as the suit may be treated as one within the general equity jurisdiction of the District Court, we have no jurisdiction on a direct appeal to review its decision.

First. The District Court held that the appellant was entitled to bring this suit under the Urgent Deficiencies Act to set aside the order, because it had intervened in the proceedings before the Commission, and because it is a connecting carrier and a minority stockholder of the Wheeling. The court erred in so holding. The mere fact that appellant was permitted to intervene before the Commission does not entitle it to institute an independent suit to set aside the Commission's order in the absence of resulting actual or threatened legal injury to it, *Alexander Sprunt & Son* v. *United States, ante,* p. 249. Nor does the mere fact that its lines connect with those of the

Wheeling near the City of Pittsburgh, Pennsylvania,[6] entitle it to bring the suit. Its lines do not extend to Cleveland; and there is no suggestion that the order can affect it as carrier.[7] Finally, the claim that the order threatens the Wheeling's financial stability, and consequently appellant's financial interest as a minority stockholder is not sufficient to show a threat of the legal injury necessary to entitle it to bring a suit to set aside the order. This financial interest does not differ from that of every investor in Wheeling securities or from an investor's interest in any business transaction or lawsuit of his corporation. Unlike orders entered in cases of reorganization, and in some cases of acquisition of control of one carrier by another,[8] the order under attack does not deal with the interests of investors. The injury feared is the indirect harm which may result to every stockholder from harm to the corporation. Such stockholder's interest is clearly insufficient to give the Pittsburgh a standing independently to institute suit to annul

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[6] The Pittsburgh's lines connect with those of the Wheeling at Mingo Junction and at Pittsburgh Junction, Ohio.

[7] The Pittsburgh contends also that it is seeking to acquire control of the Wheeling and that the Interstate Commerce Commission has allocated the Wheeling and the Pittsburgh to one system in its plan for the consolidation of the railroads. But these vague speculative interests are clearly insufficient to give the Pittsburgh an independent standing in this suit.

[8] See Control of Big Four by N. Y. Central, 72 I. C. C. 96; Nickel Plate Unification, 105 I. C. C. 425; Control of Cincinnati, Indianapolis & Western R. R., 124 I. C. C. 476; Unification of Southwestern Lines, 124 I. C. C. 401; N. Y. Central Unification, 150 I. C. C. 278; Lease of Louisville, Henderson & St. Louis Ry., 150 I. C. C. 741; Control Erie R. R. & Pere Marquette Ry., 150 I. C. C. 751; Denver & Rio Grande Western Reorganization, 90 I. C. C. 141. Compare Stock of Baltimore & Ohio R. R., 131 I. C. C. 27.

this order. The bill should have been dismissed without inquiry into the merits.

Second. The prayer that the contemplated action of the Wheeling should be enjoined because its directors hold office illegally, are faithless to their trust, are acting in violation of the rights of stockholders under the Ohio law, and, hence, that the Wheeling could not legally exercise the authority granted to it by the Commission, was not properly joined in this suit and is not subject to review in this Court on a direct appeal. An application for such relief may not be included in a bill under the Urgent Deficiencies Act to set aside an order of the Interstate Commerce Commission. Compare *Cleveland, C. C. & St. L. Ry. Co.* v. *United States,* 275 U. S. 404, 414; *Great Northern Ry. Co.* v. *United States,* 277 U. S. 172, 181. It is neither ancillary to nor dependent upon the judgment as to the order. Relief of that character may be had only in a suit invoking the plenary equity jurisdiction of the district court. Such a suit would be heard in ordinary course by a single judge; and it would be appealable only to the Circuit Court of Appeals. The case at bar is wholly unlike *The Chicago Junction Case,* 264 U. S. 258, 269, where a prayer to set aside the illegal purchase of stock and the lease already made was held proper as ancillary to setting aside the order of the Commission authorizing the same. There, the joinder was permitted in order to carry out the purpose of Congress to make the judicial review effective. Here, such joinder is unnecessary for that purpose. Moreover, grounds for general equitable relief, obviously, cannot give the Pittsburgh a standing in this Court on direct appeal under the Urgent Deficiencies Act, when it had no right to bring suit under that Act.

While there was no occasion for the district court to consider the merits, the bill was properly dismissed. The

decree is affirmed without prejudice to the right, if any, of the Pittsburgh to enjoin in a proper proceeding action by the Wheeling.

Affirmed.

UNITED STATES v. UPDIKE ET AL.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. 340. Argued April 15, 1930.—Decided May 19, 1930.

1. Under §§ 278 (d) and 280 of the Revenue Act of 1926, a suit in equity against stockholders of a dissolved corporation to charge them, as distributees of its assets, with the amount of a tax assessed against the corporation, is a proceeding to collect the tax and is barred if not brought within six years after the assessment. P. 492.
2. Where, under the Revenue Act of 1926 in a "no return" case, an assessment, which, under § 278 (a), may be made at any time, has in fact been made, a proceeding to collect must be begun within six years thereafter; but where there has been no assessment, the proceeding may be begun at any time. P. 494.
3. The provision of § 278 (d) of the Revenue Act of 1926, that, "Where the assessment . . . has been made . . . within the statutory period of limitation properly applicable thereto, such tax may be collected . . . by a proceeding in court . . . but only if begun (1) within six years after the assessment of the tax," applies to an assessment in 1920 of 1917 taxes, notwithstanding that in 1920 when the assessment was made, there was, and had been, no provision of law which in any form limited the time for assessing or collecting taxes. P. 495.
4. The saving clause, "within the statutory period of limitation properly applicable thereto," in § 278 (d) of the Revenue Act of 1926, was inserted solely for the protection of the taxpayer; that is to say, in order to preclude collection of the tax even within six years after the assessment, if that assessment, when made, was barred by the applicable statutory limitation. P. 496.
5. Taxing acts, including provisions of limitation embodied therein, are to be construed liberally in favor of the taxpayer. *Id.*

32 F. (2d) 1, affirmed.

CERTIORARI, 280 U. S. 543, to review a decree of the Circuit Court of Appeals, which affirmed a decree of the District Court, 25 F. (2d) 746, against the United States in a suit brought against stockholders of a dissolved corporation to recover a tax.

Assistant Attorney General Youngquist, with whom *Mr. Sewall Key* and *Helen R. Carloss,* Special Assistants to the Attorney General, were on the brief, for the United States.

Messrs. Francis A. Brogan and *Alfred G. Ellick,* with whom *Messrs. Anan Raymond* and *Dana B. Van Dusen* were on the brief, for respondents.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

Prior to the passage of the Revenue Act of 1917, the Updike Grain Company, a Nebraska corporation, filed its income tax and excess profits tax returns for the eleven months ending June 30, 1917, that being the end of the fiscal year which the corporation had selected as its annual period for federal taxation. The returns in form complied with the provisions of the law then in force, and were correct in point of fact. The full amount of the tax, as shown by the returns, was paid. In August, 1917, the corporation was lawfully dissolved and its assets, after payment of all debts, were distributed among its stockholders. Shortly after the passage of the Revenue Act of October 3, 1917, which, among other changes, increased the rate of taxation, the Commissioner of Internal Revenue issued a regulation providing that corporations which had dissolved in 1917 prior to the date of that act, should file tax returns in accordance with its provisions for the period preceding dissolution. A blank form for that purpose was mailed to the corporation, but was returned by

its former secretary unexecuted with the information that the corporation, prior to its dissolution, had filed tax returns and paid all taxes due under existing laws.

In October, 1918, a revenue agent examined the books of the corporation and made a return in regular form, upon which, in January, 1920, additional income and excess profits taxes were assessed for the period ending June 30, 1917. The return so made was not verified or signed in behalf of the corporation, or otherwise. The present suit to recover the amount was brought against respondents, stockholders of the corporation, in 1927, more than seven years after the assessment. The theory upon which the suit was begun and prosecuted is, that the assets of the corporation distributed to the stockholders, to the extent of the additional taxes, became trust funds received to the use of the United States. The federal district court entered a decree dismissing the bill. 25 F. (2d) 746. Upon appeal the circuit court of appeals affirmed the decree upon the ground that the suit was barred by the provisions of § 278 of the Revenue Act of 1926, c. 27, 44 Stat. 9, 59; U. S. C. Supp., Title 26, §§ 1058, 1060, 1061. 32 F. (2d) 1.

The principal question presented here, and the only one we need consider, is whether the suit, having been brought more than six years after the assessment, was barred by the provisions of § 278 quoted below.

"(a) In the case . . . of a failure to file a return the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time.

* * * * *

"(d) Where the assessment . . . has been made (whether before or after the enactment of this Act) within the statutory period of limitation properly applicable thereto, such tax may be collected by distraint or by a proceeding

in court (begun before or after the enactment of this Act), but only if begun (1) within six years after the assessment of the tax, . . ." U. S. C. Supp., Title 26, §§ 1058, 1061.

In accordance with the claim of the government the court below held that there was a failure to file a return within the meaning of paragraph (a). See also *Updike* v. *United States*, 8 F. (2d) 913. We assume without deciding the correctness of that view and consider the case accordingly.

The government contends—(1) that § 278 (d) relates only to proceedings to collect taxes *qua* taxes, and not to suits in equity to recover "trust funds," and that the present suit is of the latter character; but (2) that the present case is not within the provisions of that section even if a suit against the stockholders be controlled by the same rule as a proceeding against the corporation itself.

First. The first point turns upon the question whether this is a proceeding to collect a tax, as to which it is said that the provision of § 278(d) that "such tax may be collected . . . by a proceeding in court," etc., refers only to a direct proceeding against the taxpayer; and that this view is borne out by a consideration of § 280 (c. 27, 44 Stat. 9, 61; U. S. C. Supp., Title 26, § 1069),*

* Sec. 280. (a) The amounts of the following liabilities shall, except as hereinafter in this section provided, be assessed, collected, and paid in the same manner and subject to the same provisions and limitations as in the case of a deficiency in a tax imposed by this title (including the provisions in case of delinquency in payment after notice and demand, the provisions authorizing distraint and proceedings in court for collection, and the provisions prohibiting claims and suits for refunds):

(1) The liability, at law or in equity, of a transferee of property of a taxpayer, in respect of the tax (including interest, additional amounts, and additions to the tax provided by law) imposed upon

which prescribes a mode of procedure against transferees of the property of a taxpayer.

The contention is that by the language of § 280 Congress has clearly differentiated between taxpayers and transferees by referring to the liability of the latter as "the liability at law or in equity, of a transferee of property of a taxpayer, in respect of the tax . . . imposed upon the taxpayer," and then, apparently realizing that the limitation periods as to the collection of taxes *qua* taxes would have no application to the remedy against transferees, creating a distinct period of limitation in respect thereof.

This view of the statute is not admissible. The plain words of § 280(a) are, that, "except as hereinafter in this section provided," the liability of the transferee shall be "assessed, collected, and paid" subject, among other things, to the same "provisions and limitations as in the case of a deficiency in a tax imposed by this title

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the taxpayer by this title or by any prior income, excess-profits, or war-profits tax Act.

* * * * *

(b) The period of limitation for assessment of any such liability of a transferee or fiduciary shall be as follows:

(1) Within one year after the expiration of the period of limitation for assessment against the taxpayer; or

(2) If the period of limitation for assessment against the taxpayer expired before the enactment of this Act but assessment against the taxpayer was made within such period—then within six years after the making of such assessment against the taxpayer, but in no case later than one year after the enactment of this Act.

* * * * *

(c) For the purposes of this section, if the taxpayer is deceased, or in the case of a corporation, has terminated its existence, the period of limitation for assessment against the taxpayer shall be the period that would be in effect had the death or termination of existence not occurred.

(including . . . the provisions authorizing . . . proceedings in court for collection . . .)." Nothing thereinafter provided in that section affects the application to the present case of these general words in respect of limitations, for, while the succeeding paragraphs contain provisions of limitation in respect of assessment, they contain none in respect of collection. It seems plain enough, without stopping to cite authority, that the present suit, though not against the corporation but against its transferees to subject assets in their hands to the payment of the tax, is in every real sense a proceeding in court to collect a tax. The tax imposed upon the corporation is the basis of the liability, whether sought to be enforced directly against the corporation or by suit against its transferees. The aim in the one case, as in the other, is to enforce a tax liability; and the effect of the language above quoted from § 280 is to read into that section, and make applicable to the transferee equally with the original taxpayer, the provision of § 278(d) in relation to the period of limitation for the collection of a tax. Indeed, when used to connote payment of a tax, it puts no undue strain upon the word "taxpayer" to bring within its meaning that person whose property, being impressed with a trust to that end, is subjected to the burden. Certainly it would be hard to convince such a person that he had not paid a tax.

Second. It follows that if by § 278(d) the period of limitation had run in favor of the corporation, it had run in favor of the transferees. The contention of the government that the section does not apply under the facts of the present case, depends upon the meaning of the phrase which we have italicized: "Where the assessment . . . has been made . . . *within the statutory period of limi-*

tation properly applicable thereto, such tax may be collected . . . by a proceeding in court . . . but only if begun (1) within six years after the assessment of the tax . . ." The argument, in effect, is this: In 1920 when the assessment was made, there was, and had been, no provision of law which in any form limited the time for assessing or collecting taxes, and, therefore, an assessment in 1920 of 1917 taxes could not fulfil the requirements of § 278(d), because, in that view, there was no "statutory period of limitation properly applicable thereto"; and, assuming the applicability of statutes passed after 1920, the provision in these statutes is that the assessment may be made "at any time," and that is not a *period* of limitation within the meaning of § 278(d), for the word "period" connotes a stated interval of time commonly thought of in terms of years, months and days.

The clear intent of § 278, as applied to the facts of the present case, was to designate the extent of time for the enforcement of the tax liability. Where, in a "no return" case, an assessment, which, under paragraph (a), may be made at any time, has in fact been made, a proceeding to collect must be begun within six years thereafter; but where there has been no assessment, the proceeding may be begun at any time. In the present case there was an assessment, and it would not be doubted that the suit was barred at the expiration of the six-year period of limitation, unless for the presence of the words italicized above. Have these words the effect of averting the bar? We think not. An actual assessment having been made, it must be assumed that the government was in possession of the facts which gave rise to the liability upon which the assessment was predicated. In such case to allow an indefinite time for proceeding to collect the

tax would be out of harmony with the obvious policy of the act to promote repose by fixing a definite period after assessment within which suits and proceedings for the collection of taxes must be brought.

In the light of that policy, it seems reasonably clear that the saving clause, "within the statutory period of limitation properly applicable thereto," was inserted solely for the protection of the taxpayer—that is to say, in order to preclude collection of the tax even within six years after the assessment, if that assessment, when made, was barred by the applicable statutory limitation. This conclusion is confirmed, if confirmation be necessary, by the provisions of paragraph (a), which clearly contemplate that the six-year period shall apply, except where the proceeding to collect is brought "without assessment," in which event it may be brought "at any time."

It may be that the saving clause was not strictly necessary, but was inserted from excessive care to put the right of the taxpayer beyond dispute. In any event, we think this is the fair interpretation of the clause, and the one which must be accepted, especially in view of the rule which requires taxing acts, including provisions of limitation embodied therein, to be construed liberally in favor of the taxpayer. *Bowers* v. *N. Y. & Albany Co.*, 273 U. S. 346, 349.

This disposes of the case and it becomes unnecessary to determine whether the phrase, "at any time," imports a "period of limitation," or to consider other questions presented in argument.

Decree affirmed.

TYLER ET AL., ADMINISTRATORS, v. UNITED STATES.

UNITED STATES v. PROVIDENT TRUST COMPANY ET AL., ADMINISTRATORS.

LUCAS, COMMISSIONER OF INTERNAL REVENUE, v. GIRARD TRUST COMPANY ET AL., EXECUTORS.

CERTIORARI TO THE CIRCUIT COURTS OF APPEALS FOR THE FOURTH AND THIRD CIRCUITS.

Nos. 428, 546 and 547. Argued April 24, 1930.—Decided May 19, 1930.

1. The power of Congress to impose a tax in the event of death does not depend upon whether there has been a "transfer" of property by the death of the decedent, but whether the death has brought into being or ripened for the survivor, property rights of such character as to make appropriate the imposition of a tax upon that result (which Congress may call a transfer tax, a death duty or anything else it sees fit,) to be measured in whole or in part by the value of such rights. P. 502.
2. The inclusion of property held by husband and wife as tenants by the entirety, no part of which originally belonged to the survivor, in the gross estate of the decedent spouse for the purpose of computing the tax "upon the transfer of the net estate" imposed by the Revenue Acts of 1916 and 1921, §§ 201–202, does not result in imposing a direct tax in violation of the constitutional requirement of apportionment. Const. Art. I, § 2, cl. 3, and § 9, cl. 4. Pp. 503–504.
3. To include in the gross estate of a decedent, for the purpose of computing the tax "upon the transfer of the net estate," the value of property held by him and another as tenants by the entirety, where such property originally belonged in no part to the survivor but came to the tenancy as a pure gift from the decedent, is neither arbitrary nor capricious and does not violate the due process clause of the Fifth Amendment. P. 504.
4. The evident and legitimate aim of Congress was to prevent an avoidance, in whole or in part, of the estate tax by this method of

disposition during the lifetime of the spouse who owned the property, or whose separate funds had been used to procure it; and the provision under review is an adjunct of the general scheme of taxation of which it is a part, entirely appropriate as a means to that end. P. 505.

33 F. (2d) 724, reversing 28 F. (2d) 887, affirmed.

35 F. (2d) 339 and 35 F. (2d) 343, reversed.

CERTIORARI, 280 U. S. 548, 551, to review judgments of the Circuit Courts of Appeals in three cases involving the constitutionality of the federal estate tax in respect of the provisions requiring the inclusion of the interests of tenants by the entirety in the gross estate.

Mr. Frank S. Bright, with whom *Mr. H. Stanley Hinrichs* was on the brief, for Tyler et al.

Mr. John S. Sinclair, with whom *Messrs. Cuthbert H. Latta, Jr., J. Snowdon Rhoads, Charles Sinkler, John R. Yates,* and *Paul F. Myers* were on the brief, for Provident Trust Company and Girard Trust Company et al.

Mr. Claude R. Branch, Special Assistant to the Attorney General, with whom *Attorney General Mitchell, Assistant Attorney General Youngquist, Messrs. Sewall Key, J. Louis Monarch, Randolph C. Shaw,* Special Assistants to the Attorney General, and *Erwin N. Griswold* were on the brief, for the United States and Commissioner of Internal Revenue.

Messrs. Edward H. Blanc and *Russell L. Bradford,* by special leave of Court, filed a brief as *amici curiæ,* on behalf of the City Bank Farmers Trust Company.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

These cases present the question whether property owned by husband and wife as tenants by the entirety may be included, without contravening the Constitution,

in the gross estate of the decedent spouse for the purpose of computing the tax "upon the transfer of the net estate" imposed by the revenue acts of 1916, c. 463, 39 Stat. 756, 777–778, and of 1921, c. 136, 42 Stat. 227, 277–278.

In No. 428, which arose under the act of 1916, the decedent had been a resident of Maryland. At the time of his death, he and his wife owned as tenants by the entirety shares of stock in a West Virginia corporation doing business in Maryland. The decedent had been the sole owner of the stock and created the tenancy by a conveyance executed in 1917. The stock was included in the gross estate of the decedent at its value at the time of his death. The total tax assessed was paid, and the administrators brought suit to recover the portion of the amount so paid attributable to the stock, together with interest. The trial court gave judgment against the government, 28 F. (2d) 887, which was reversed by the court of appeals. 33 F. (2d) 724.

In No. 546, which arose under the act of 1921, the decedent and his wife, residents of Pennsylvania, held title to certain ground rent and to certain real estate in that state which had been conveyed to them as tenants by the entirety. The property had been acquired with the husband's separate funds and no part of the purchase price was furnished by the wife. The decedent died in 1923 leaving his wife as sole beneficiary under his will. The administrators filed an estate tax return which did not include the property interests above described. The Commissioner of Internal Revenue added this property to the gross estate and assessed a deficiency of taxes on that account. The Board of Tax Appeals held there was no deficiency. 5 B. T. A. 1004. Suit thereupon was instituted by the Commissioner in a federal district court. That court held that the section of the act which author-

ized the inclusion of the property was unconstitutional, and gave judgment against the government. This judgment the court of appeals affirmed. 35 F. (2d) 339.

In No. 547, which also arose under the act of 1921, the decedent owned real estate in Pennsylvania, of which state she was a resident. In 1923 the property was conveyed to a third person, who, in turn, reconveyed it to the decedent and her husband as "tenants by the entireties." After the death of the decedent, the Commissioner, for the purpose of computing the estate tax, included in her gross estate the value of the real estate so held. On appeal the Board of Tax Appeals held this inclusion to be erroneous. 10 B. T. A. 1100. The Commissioner filed a petition for review with the court of appeals, and that court affirmed the action of the board upon the authority of No. 546, which had just been decided. 35 F. (2d) 343.

In each case the estate was created after the passage of the applicable act; and none of the property constituting it had, prior to its creation, ever belonged to the surviving spouse.

The relevant provisions of the two acts are the same, and it will be sufficient to quote from the act of 1916.

"Sec. 201. That a tax (hereinafter in this title referred to as the tax), equal to the following percentages of the value of the net estate, to be determined as provided in section two hundred and three, is hereby imposed upon the transfer of the net estate of every decedent dying after the passage of this Act, whether a resident or nonresident of the United States:

* * * * *

"Sec. 202. That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated:

* * * * *

"(c) To the extent of the interest therein held jointly or as tenants in [by] the entirety by the decedent and any other person, or deposited in banks or other institutions in their joint names and payable to either or the survivor, except such part thereof as may be shown to have originally belonged to such other person and never to have belonged to the decedent."

The applicable provision of § 202(c) is explicit, and the intent of Congress thereby to impose the challenged tax is not open to doubt. The sole question is in respect of its constitutional validity. The attack is upon two grounds: (1) that so far as the tax is based upon the inclusion of the value of the interest in the estate held by the decedent and spouse as tenants by the entirety, it is an unapportioned direct tax and violates Art. 1, § 2, cl. 3 and § 9, cl. 4 of the Constitution; (2) that such a tax amounts to a deprivation of property without due process of law in violation of the Fifth Amendment.

The decisions of the courts of Maryland and Pennsylvania follow the common law and are in accord in respect of the character and incidents of tenancy by the entirety. In legal contemplation the tenants constitute a unit; neither can dispose of any part of the estate without the consent of the other; and the whole continues in the survivor. In Maryland, such a tenancy may exist in personal property as well as in real estate. These decisions establish a state rule of property, by which, of course, this court is bound. *Warburton* v. *White*, 176 U. S. 484, 496.

1. The contention that, by including in the gross estate the value of property held by husband and wife as tenants by the entirety, the tax *pro tanto* becomes a direct tax—that is a tax on property—and therefore invalid without apportionment, proceeds upon the ground

that no right in such property is transferred by death, but the survivor retains only what he already had. Section 201 imposes the tax "upon the transfer of the net estate"; and if that section stood alone, the inclusion of such property in the gross estate of the decedent probably could not be justified by the terms of the statute. But § 202 definitely includes the property and brings it within the reach of the words imposing the tax; so that a basis for the constitutional challenge is present. Prior decisions of this court do not solve the problem thus presented, though what was said in *Chase National Bank* v. *United States,* 278 U. S. 327, 337-339; *Reinecke* v. *Northern Trust Co.,* 278 U. S. 339, 348; and *Saltonstall* v. *Saltonstall,* 276 U. S. 260, 271, constitutes helpful aid in that direction.

Death duties rest upon the principle that death is the "generating source" from which the authority to impose such taxes takes its being, and "it is the power to transmit or the transmission or receipt of property by death which is the subject levied upon by all death duties." *Knowlton* v. *Moore,* 178 U. S. 41, 56, 57. But mere names and definitions, however important as aids to understanding, do not conclude the lawmaker, who is free to ignore them and adopt his own. *Karnuth* v. *United States,* 279 U. S. 231, 242. A tax laid upon the happening of an event, as distinguished from its tangible fruits, is an indirect tax which Congress, in respect of some events not necessary now to be described more definitely, undoubtedly may impose. If the event is death and the result which is made the occasion of the tax is the bringing into being or the enlargement of property rights, and Congress chooses to treat the tax imposed upon that result as a death duty, even though, strictly, in the absence of an expression of the legislative will, it might not thus be denominated, there is nothing in the Constitution which stands in the way.

The question here, then, is, not whether there has been, in the strict sense of that word, a "transfer" of the property by the death of the decedent, or a receipt of it by right of succession, but whether the death has brought into being or ripened for the survivor, property rights of such character as to make appropriate the imposition of a tax upon that result (which Congress may call a transfer tax, a death duty or anything else it sees fit), to be measured, in whole or in part, by the value of such rights.

According to the amiable fiction of the common law, adhered to in Pennsylvania and Maryland, husband and wife are but one person, and the point made is, that by the death of one party to this unit no interest in property held by them as tenants by the entirety passes to the other. This view, when applied to a taxing act, seems quite unsubstantial. The power of taxation is a fundamental and imperious necessity of all government, not to be restricted by mere legal fictions. Whether that power has been properly exercised in the present instance must be determined by the actual results brought about by the death, rather than by a consideration of the artificial rules which delimit the title, rights and powers of tenants by the entirety at common law. See *Nicol* v. *Ames*, 173 U. S. 509, 516; *Saltonstall* v. *Saltonstall, supra*, p. 271.

Taxation, as it many times has been said, is eminently practical, and a practical mind, considering results, would have some difficulty in accepting the conclusion that the death of one of the tenants in each of these cases did not have the effect of passing to the survivor substantial rights, in respect of the property, theretofore never enjoyed by such survivor. Before the death of the husband (to take the *Tyler* case, No. 428,) the wife had the right to possess and use the whole property, but so, also, had her husband; she could not dispose of the property

except with her husband's concurrence; her rights were hedged about at all points by the equal rights of her husband. At his death, however, and because of it, she, for the first time, became entitled to exclusive possession, use and enjoyment; she ceased to hold the property subject to qualifications imposed by the law relating to tenancy by the entirety, and became entitled to hold and enjoy it absolutely as her own; and then, and then only, she acquired the power, not theretofore possessed, of disposing of the property by an exercise of her sole will. Thus the death of one of the parties to the tenancy became the "generating source" of important and definite accessions to the property rights of the other. These circumstances, together with the fact, the existence of which the statute requires, that no part of the property originally had belonged to the wife, are sufficient, in our opinion, to make valid the inclusion of the property in the gross estate which forms the primary base for the measurement of the tax. And in that view the resulting tax attributable to such property is plainly indirect.

2. The attack upon the taxing act as constituting a violation of the Fifth Amendment is wholly without merit. The point made is that the tax is so arbitrary and capricious as to amount to confiscation, and, therefore, to result in a deprivation of property without due process of law. The tax, as we have just held, falls within the power of taxation granted to Congress, and the challenge becomes one not to the power, but to an abuse of it. The possibility that a federal statute passed under the taxing power may be so arbitrary and capricious as to cause it to fall before the due process of law clause of the Fifth Amendment must be conceded—*Brushaber* v. *Union Pac. R. R.*, 240 U. S. 1, 24, and cases cited; *Nichols* v. *Coolidge*, 274 U. S. 531, 542—but the present statute is not of that character. To include in the gross estate, for

the purpose of measuring the tax, the value of property, no part of which originally belonged to one spouse, but which came to the tenancy, mediately or immediately, as a pure gift from the other, and which, as a consequence of the latter's death, was relieved from restrictions imposed by the law in respect of tenancy by the entirety so as to produce in the survivor the right of sole proprietorship, is obviously neither arbitrary nor capricious. The evident and legitimate aim of Congress was to prevent an avoidance, in whole or in part, of the estate tax by this method of disposition during the lifetime of the spouse who owned the property, or whose separate funds had been used to procure it; and the provision under review is an adjunct of the general scheme of taxation of which it is a part, entirely appropriate as a means to that end. *Taft* v. *Bowers*, 278 U. S. 470, 482.

No. 428, judgment affirmed.
No. 546, judgment reversed.
No. 547, judgment reversed.

GEORGIA POWER COMPANY *v.* CITY OF DECATUR.

CERTIORARI TO THE SUPREME COURT OF GEORGIA.

No. 363. Argued April 16, 17, 1930.—Decided May 19, 1930.

1. Upon review of a decree of a state court requiring a street railway company to continue operating for a non-compensatory rate upon the ground that it is bound to operate for that rate by contract with a municipality, this Court must pass upon the company's claim that the contract has expired and that the decree deprives it of its property without due process of law. P. 508.
2. A street railway company in Georgia, which, pursuant to a town ordinance, made a contract with the town prescribing a maximum fare with respect to one of its lines situate partly within the town

limits, afterwards claimed that the only franchise for the operation of the line within the town was an earlier ordinance of the town under which the line had been constructed by the company's predecessor in title, and that the obligation to operate the line and maintain the contract fare ended with the expiration of the predecessor's charter some time after the date of the contract. *Held*, (accepting the state court's construction of the state law and its decision as to the effect of the contract), that the new company's franchise to operate was granted by the State; that all that the town could give was its consent to use the streets, which was given by the contract, and that the franchise of the new company and the contract are still in force. P. 509.

3. There is nothing in the ordinance or contract here in question to indicate a purpose to terminate the obligation of the carrier in respect of the fare limited while it continues to operate the line as part of its system under its present franchise. P. 510.
4. The contract will continue to bind the carrier during the period intended by the parties unless earlier altered by them or relaxed by state authority, and losses attributable to the stretch of track in question and the fares fixed by the contract are immaterial while the contract continues. P. 511.

168 Ga. 705, affirmed.

CERTIORARI, 280 U. S. 544, to review a decree which affirmed a decree permanently enjoining the present petitioner from ceasing to operate a street railway line within the City of Decatur, Georgia, and from violating a contract fixing rates of fare and transfer privileges.

Mr. Walter T. Colquitt, with whom *Mr. Ben J. Conyers* was on the brief, for petitioner.

Mr. Hooper Alexander for respondent.

MR. JUSTICE BUTLER delivered the opinion of the Court.

The city of Decatur brought this suit in the superior court of DeKalb county against the Georgia Railway and Electric Company and the Georgia Railway and Power Company. The former was the owner and the latter was the lessee and operator of a system of street

and suburban railway lines of more than 200 miles serving Atlanta, Decatur and other places in that part of Georgia. Before trial, they consolidated and became the Georgia Power Company, and it was made the defendant. The city prayed, and the court granted, a decree permanently enjoining petitioner from violating an ordinance passed by the city March 3, 1903, from violating a contract of April 1, 1903, based upon the ordinance, and from ceasing to operate about a mile of its line in Decatur. The decree was affirmed by the state supreme court. 168 Ga. 705.

Prior to the commencement of this suit it had been finally adjudged in litigation between the city and petitioner's predecessors that the ordinance and contract bound the carrier not to charge more than five cents per passenger between points on that stretch of track in Decatur and the terminus of the line in Atlanta and required it upon the payment of each full fare to give to the passenger a transfer ticket that would entitle him for one fare to ride between points on such track and points on any of the carrier's lines in Atlanta. It was also held that the state railroad commission was without authority to change rates that are established by contract. *Georgia Ry. & Power Co.* v. *Railroad Comm.*, 149 Ga. 1. *Georgia Ry. & Power Co.* v. *Town of Decatur*, 152 Ga. 143. *Georgia Ry. & Power Co.* v. *Decatur*, 153 Ga. 329; 262 U. S. 432. The duration of the defendant's obligation to operate that line or to serve for such contract fare was not determined.

August 14, 1919, the commission fixed the carrier's fares other than those covered by the contract at six cents; September 22, 1920, it raised them to seven cents, and December 15, 1927, it made them ten cents per passenger but required the carrier to sell four tickets for thirty cents. The cost of the transportation covered by the contract fare, exclusive of any compensation for the use of prop-

erty employed to furnish the service, exceeds the revenue derived therefrom and is substantially higher per passenger than the cost of service covered by the fares fixed by the commission. An ordinance of the city of Decatur passed May 15, 1925, directed paving of the streets occupied by the line in question and the assessment of a substantial portion of the cost against the lessee. Thereupon lessor and lessee offered to surrender to the city the permit for the operation of the line and the lessee notified the city that at a time specified it would discontinue the service. The city refused to accept the surrender and promptly brought this suit.

Petitioner maintained below and here insists that the franchise and the rate contract expired August 16, 1919, and that its obligation to operate the line or keep the five cent fare in force was terminated by such offer and notice. See *Denver* v. *Denver Union Water Co.*, 246 U. S. 178, 184. It contends that the rate is confiscatory, that the decree requires it to operate the line and to serve for the five cent fare and that, if compelled so to do, it will be deprived of its property without due process of law in violation of the Fourteenth Amendment.

This court has recently held that the usual permissive charter of a railroad company does not oblige the company to operate its railroad at a loss; that, where it is reasonably certain that future operation will be at a loss, the company, in the absence of contract obligation to continue, may cease, and if in such circumstances the company were compelled by the State to continue to operate at a loss, it would be deprived of its property without due process of law. *Railroad Commission* v. *Eastern Texas R. R.*, 264 U. S. 79. The State may not by any of its agencies disregard the prohibitions of the Fourteenth Amendment. *Chicago, Burlington, &c. R'd* v. *Chicago*, 166 U. S. 226, 234. *Raymond* v. *Chicago Traction Company*, 207 U. S. 20, 36. We are therefore required to

pass upon the merits of petitioner's claim. *Stearns* v. *Minnesota,* 179 U. S. 223, 232. *Ward* v. *Love County,* 253 U. S. 17, 22.

By an Act of the Georgia legislature passed August 16, 1889 (Acts 1888–89, p. 211) the Collins Park and Belt Railroad Company was incorporated and empowered to construct and operate street railways in Atlanta, in other parts of Fulton county and in DeKalb and other counties. Subsequently its name was changed to the Atlanta Rapid Transit Company. It applied for and the town of Decatur by ordinance passed September 4, 1899, granted to it a "franchise" to construct and operate the line in question. The Act does not specify the term of the company's charter and there is nothing in it or in the ordinance to fix the duration of the carrier's obligation to operate the line. January 1, 1902, the Georgia Railway and Electric Company was incorporated for the term of 101 years and was empowered by the Act under which it was organized to acquire and operate street and suburban railways. Acts 1892, p. 37. On March 28, 1902, the Atlanta Rapid Transit Company conveyed all its property to the last mentioned company. March 3, 1903, the town of Decatur by ordinance granted the latter permission to discontinue operation and remove one of its Decatur lines upon the condition that it should continue to operate the stretch of track here involved and "never charge more than five cents for one fare" for the transportation above described. And April 1, 1903, the town and the company made a contract by which each agreed to do all the things required to be by it performed under the terms of the ordinance. October 16, 1911, the Georgia Railway and Power Company was incorporated as an interurban and street railroad company for the term of 101 years, and January 1, 1912, the Railway and Electric Company leased all its lines of railway and other property to the latter for a term of 999 years.

It may be assumed, as contended by petitioner, that under the state law (Code, § 2215) the charter of the Collins Park Company expired August 16, 1919, thirty years after passage of the special Act, and that it was not bound by its franchise to continue to operate the line after that date. See *Turnpike Co.* v. *Illinois,* 96 U. S. 63, 68. The petitioner contends that the ordinance of September 4, 1899, was the only franchise for the operation of the line in question, and that the obligation to operate the line and maintain the contract fare ended with the expiration of the charter of the Collins Park Company.

But franchises for the construction and operation of street railway lines are granted by the State. And January 1, 1902, the State chartered the Georgia Railway and Electric Company. In this case the supreme court held (p. 709) that under the state constitution (Code, § 6448) "all that towns and cities have to give to the construction of passenger street-railways within the limits of the same is the consent of the corporate authorities." And it held that by the contract of April 1, 1903, the city of Decatur gave its consent for the use of its streets by the Electric Company. We accept that court's construction of the Acts of the legislature and the ordinance and its decision as to the effect of the contract of April 1, 1903. Upon the conveyance by the Atlanta Rapid Transit Company the system, including the Decatur line in question, passed to the Georgia Railway and Electric Company, to be operated under the franchise granted to that company by the Act of the legislature under which it was incorporated. It is clear that this franchise and the rate contract of April 1, 1903, are still in force.

There is nothing in the ordinance or contract to indicate a purpose to terminate the obligation of the carrier in respect of the five cent fare while it continues to operate the line as part of its system under its present franchise (*Fort Smith Traction Co.* v. *Bourland,* 267 U. S. 330),

and the contract will continue to bind petitioner during the period intended by the parties unless earlier altered by them or relaxed by state authority. *Georgia Ry. Co.* v. *Decatur,* 262 U. S. 432, 438. The losses attributable to the stretch of track in question and the five cent fare are immaterial while the rate contract continues. *Public Service Co.* v. *St. Cloud,* 265 U. S. 352, 355. *R. R. Commission* v. *Los Angeles R. Co.,* 280 U. S. 145, 152.

Decree affirmed.

WESTERN CARTRIDGE COMPANY *v.* EMMERSON, SECRETARY OF STATE OF ILLINOIS.

CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

No. 375. Argued April 21, 1930. Decided May 19, 1930.

A state franchise tax or license fee imposed on a manufacturing corporation at the rate of five cents per hundred shares of that portion of its issued capital stock which bore the same ratio to all its issued capital stock as the amount of its property and business within the State bore to its total business and property, *held* not violative of the commerce clause although much of the business included in the computation as transacted in the State consisted of sales of goods upon orders received from outside and accepted by mail, the goods being shipped by the corporation f. o. b. at its factories to the destinations designated by the purchasers. *Air Way Corp.* v. *Day,* 266 U. S. 71, distinguished.

335 Ill. 150, affirmed.

CERTIORARI, 280 U. S. 545, to review a judgment sustaining the dismissal of the bill in a suit to enjoin payment to the Treasurer of Illinois of the amount of a tax collected from the petitioner by the respondent Secretary of State.

Mr. Colin C. H. Fyffe for petitioner.

Mr. Bayard Lacey Catron, Assistant Attorney General of Illinois, with whom *Mr. Oscar E. Carlstrom,* Attorney General, was on the brief, for respondent.

MR. JUSTICE BUTLER delivered the opinion of the Court.

Petitioner, a Delaware corporation licensed to do business in Illinois, brought this suit in the circuit court of Sangamon county to enjoin payment to the state treasurer of the amount of a license fee or franchise tax that respondent as secretary of state collected from petitioner under § 105 of the general corporation act of that State. The suit was based upon the claim that, as construed and enforced by respondent, the section violates the commerce clause of the Federal Constitution. Art. I, § 8, cl. 3. After hearing upon bill, answer and an agreed statement of facts the court dismissed the bill. The state supreme court (335 Ill. 150) affirmed the decree following our decision in *Hump Hairpin Co.* v. *Emmerson,* 258 U. S. 290, which affirmed 293 Ill. 387.

Section 105 provides: "Each corporation for profit, . . . except insurance companies, . . . organized under the laws of this state or admitted to do business in this state, . . . shall pay an annual license fee or franchise tax . . . of five cents on each one hundred dollars of the proportion of its issued capital stock . . . represented by business transacted and property located in this state, . . ."

Petitioner operates factories and has its principal office in Illinois. It there receives, upon forms furnished by it, orders for its products from persons in Illinois and elsewhere and by sending written acceptance consummates contracts of sale. In accordance with the directions contained in the orders, petitioner delivers the goods at its factories to common carriers for transportation to purchasers at various destinations in Illinois, other States and foreign countries.

Petitioner had issued capital stock of the par value of $5,701,800; it had property valued at $6,924,804.92 of

which $6,894,903.27 was situated in Illinois; its business for the year in question amounted to $11,670,925.51 of which $1,919,822.73 represented products shipped to purchasers in Illinois and $9,751,042.78, reported as interstate commerce, was made up of shipments to customers outside the State.

Respondent treated all of petitioner's business as having been transacted in Illinois and based the tax on such proportion of its outstanding capital stock as its business plus its Illinois property was of such business and all its property. The tax so calculated amounted to $2,808.03, a substantial part of which resulted from the inclusion of the transactions reported by petitioner as interstate commerce.

All of the goods sold were manufactured by the petitioner in Illinois and the manufacturing was business carried on in that State. The receipt and acceptance of orders, the packing, giving shipping directions and delivery to common carriers also constituted business in that State; these things were common to all sales whether the goods sold were sent to destinations within or without the State, but as to products shipped to other States or foreign countries the acceptance of orders and what was subsequently done by petitioner became component parts of interstate or foreign commerce. *Dahnke-Walker Co.* v. *Bondurant,* 257 U. S. 282, 290. *Lemke* v. *Farmers Grain Co.,* 258 U. S. 50, 54. *Flanagan* v. *Federal Coal Co.,* 267 U. S. 222, 225. *Federal Trade Commission* v. *Pacific Paper Assn.,* 273 U. S. 52, 63–64.

Unquestionably Illinois has power to tax all petitioner's property therein without regard to its use in connection with interstate transactions and to impose a license fee or excise upon petitioner's local business. *International Paper Co.* v. *Massachusetts,* 246 U. S. 135, 141. The tax in question was not laid directly upon interstate commerce or any of its elements. For the determination of

the amount the taxpayer's business and property located in Illinois is divided by the total of all its business and property and that percentage is applied to the issued shares and the resulting number taken for taxation at the rate of five cents per $100. As the amount depends on the relation each to the others of the various elements employed in the calculation, the fee or tax does not directly depend upon the amount of the taxpayer's interstate transactions. The exaction may rise while the sales to customers outside Illinois decline and may fall while such sales increase.

The amount imposed upon petitioner did not even indirectly burden the interstate transportation resulting from the shipping directions given by petitioner in fulfillment of its contracts of sale. There is nothing to indicate that by the enactment in question the State intended to regulate or burden such commerce or to discriminate as between sales to Illinois customers and those made to buyers in other States and countries. The tax cannot be said directly or by necessary operation to affect any of the things done by petitioner which, by reason of transportation of goods to places outside Illinois in accordance with the directions of the purchasers, became elements or component parts of interstate or foreign commerce. Petitioner's sales prices are based on deliveries to common carriers at its factories. The expense of transportation is not involved in the calculation. And it is plain that, if the fee or tax in question affected petitioner's interstate or foreign commerce at all, the burden was indirect and remote and not a violation of the commerce clause.

The petitioner relies on *Air-Way Corp.* v. *Day,* 266 U. S. 71. But, as shown by the opinion, the tax considered in that case was based on the authorized capital stock and the rate was applied to a number of shares greatly in excess of the total of all that had been issued. The com-

pany was authorized to issue 400,000 shares; it had issued only 50,485 and these represented all its property and business. The tax at the rate of five cents each on 298,520 shares was held directly to burden the company's interstate commerce. Cf. *Cudahy Co.* v. *Hinkle,* 278 U. S. 460. The case now under consideration cannot be distinguished from *Hump Hairpin Co.* v. *Emmerson, supra.* And see *International Shoe Co.* v. *Shartel,* 279 U. S. 429, 432.

Decree affirmed.

CHARTER SHIPPING COMPANY, LIMITED, *v.* BOWRING, JONES & TIDY, LIMITED.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 397. Argued April 22, 1930.—Decided May 19, 1930.

1. The retention of jurisdiction of a suit in admiralty between foreigners is within the discretion of the District Court, and the exercise of that discretion may not be disturbed unless abused. P. 517.
2. Liability in general average arises not from contract but from participation in the common venture, and its extent in the absence of limiting clauses in the bill of lading is, under the admiralty rule, fixed by the law of the port of destination. *Id.*
3. In a suit in admiralty between British corporations for the recovery of a general average deposit made in London to release cargo shipped from ports in the United States, the litigation apparently involving the application of the law of England to a fund there located, but it being claimed that limiting clauses in the bills of lading modified the liability in general average so as to put in issue the seaworthiness of the vessel at the beginning of the voyage, on which question there were American witnesses, *held:*

   (1) It was for the District Court, upon consideration of all the circumstances, to say whether it should decline jurisdiction. P. 518.

   (2) In declining jurisdiction, the District Court can not be said to have improvidently exercised its discretion. *Id.*

(3) The question of convenience of witnesses was for the District Judge to consider and determine. *Id.*

33 F. (2d) 280, reversed.

CERTIORARI, 280 U. S. 545, to review a decree of the Circuit Court of Appeals which reversed a decree of the District Court declining jurisdiction of a suit in admiralty between foreigners to recover a general average deposit made in a foreign port.

Mr. Cletus Keating for petitioner.

Mr. Theodore L. Bailey for respondent.

MR. JUSTICE STONE delivered the opinion of the Court.

Respondent, a British corporation, filed in the District Court for Southern New York a libel *in personam* against petitioner, also a British corporation, to recover a general average deposit made in London. The libel alleged that the petitioner received on its vessel, the "Charterhague," at various Gulf and Atlantic ports in the United States, shipments of rosin and turpentine for transportation to London, bills of lading for which were endorsed to the respondent. As grounds for recovery it was set up that the general average act was due to unseaworthiness of the vessel at the beginning of the voyage, unknown to respondent when it made the deposit in order to release the cargo from the general average lien.

On the libel, the general appearance and exceptions of the libelee, the petitioner here, and an answering affidavit setting up that after the libel in the present suit was filed respondent commenced suit in England involving the same subject matter, the District Court dismissed the libel, saying that contribution for general average is to

be determined by law of the port of discharge and that "under all the circumstances" jurisdiction should be declined. The Court of Appeals reversed, holding that the jurisdiction should have been retained. 33 F. (2d) 280. It pointed out that the suit did not involve a restatement of a general average adjustment and said that if the bills of lading contained a "Jason clause" or incorporated the provisions of the Harter Act, the question of due diligence to make the vessel seaworthy would be an issue in the case, citing *The Jason,* 225 U. S. 32; *The Edwin I. Morrison,* 153 U. S. 199; *Hurlbut* v. *Turnure* (D. C.) 76 Fed. 587, aff'd 81 Fed. 208; *Trinidad Shipping Co.* v. *Frame, Alston & Co.,* 88 Fed. 528; that the rule that general average is controlled by the law at the port of destination was consequently an insufficient reason for declining jurisdiction, and, in view of the statement of the affidavit that there were American witnesses as to seaworthiness, concluded that it was expedient under all the circumstances for the court to retain jurisdiction. This Court granted certiorari, 280 U. S. 545.

The retention of jurisdiction of a suit in admiralty between foreigners is within the discretion of the District Court. The exercise of its discretion may not be disturbed unless abused. *The Belgenland,* 114 U. S. 355, 368; *The Maggie Hammond,* 9 Wall. 435, 457.

The affidavit states that the bills of lading contain a clause providing for general average, but the bills of lading are not in the record and it does not appear that they embraced Jason or other clauses modifying the liability in general average. As that liability arises not from contract but from participation in the common venture, see *Hobson* v. *Lord,* 92 U. S. 397; *Barnard* v. *Adams,* 10 How. 270, 303; *The Roanoke,* 59 Fed. 161, 163; *Milburn* v. *Jamaica Fruit, &c. Co.,* (1900) 2 Q. B. 540, 550, its extent

in the absence of such limiting clauses is, under the admiralty rule, fixed by the law of the port of destination. *Hobson* v. *Lord, supra,* 411; *Mousen* v. *Amsinck,* 166 Fed. 817, 820; *Compagnie Francaise de Navigation a vapeur* v. *Bonnase,* 15 F. (2d) 202, 203; Congdon, General Average (2d Ed.) 148. Even if so limited, the extent and effect of the limitation cannot be determined apart from consideration of the rule limited.

Both the parties being British subjects and the present litigation, as well as the suit pending abroad, apparently involving the application of English law to the fund located there, it was for the District Court to say, as it did, upon a consideration of all the circumstances, whether it should decline "to take cognizance of the case if justice would be done as well by remitting the parties to the home forum." See *The Maggie Hammond, supra,* p. 457.

Even if we assume, as did the court below, that the bills of lading may have modified the liability in general average so as to put in issue the care taken to make the vessel seaworthy before sailing, we cannot say that the District Court improvidently exercised its discretion. While some witnesses as to seaworthiness were "American repairmen," it does not appear that any were in or near the southern district of New York. The libel alleges that the *Charterhague* plied as a common carrier between American ports and London where, so far as appears, her officers and crew would be available as witnesses as to the alleged unseaworthy condition of engines and boilers. It was for the District Judge to consider the facts appearing and the inferences which he might draw from them and reach his own conclusion as to the convenience of witnesses as well as the other factors upon which he decided that justice would be best served by leaving the parties to their suit in England.

Reversed.

U. S. SHIPPING BOARD MERCHANT FLEET CORPORATION *v.* HARWOOD, TRUSTEE IN BANKRUPTCY, ET AL.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 345. Argued April 16, 1930.—Decided May 19, 1930.

1. The Fleet Corporation *held* suable on contracts purporting to bind it, made by it in its own name, as a corporation organized under the laws of the District of Columbia, and describing it as representing and acting for and in behalf of the United States, but containing no words purporting to bind the United States or in terms restricting the liability of the corporation. P. 524.
2. The quasi-public character of the Fleet Corporation, and the duties imposed upon it as an agency of the United States by Acts of Congress and Executive Orders, do not except it from the rule that an agent may be bound, notwithstanding his known agency, by contracts that he executes in his own name. *Id.*
3. There is no basis for presuming that the Fleet Corporation is not to be deemed bound by the contracts into which it enters, merely because it is acting as a public agency; and its liability as measured by their terms is not to be curtailed by the presumption which might be indulged in favor of an individual acting for the Government. P. 525.
4. Section 2 (b) (2) of the Merchant Marine Act, which provides that all rights or remedies accruing as a result of contracts previously made under the Emergency Shipping Fund legislation "shall be in all respects as valid, and may be exercised and enforced in like manner, subject to the provisions of subdivision (c) of this section, as if this Act had not been passed," saves the right to sue the Fleet Corporation on its contracts. P. 527.
5. Subdivision (c) of § 2 of the Merchant Marine Act, providing that any person dissatisfied with any decision of the Shipping Board "shall have the same right to sue the United States as he would have had if the decision had been made by the President of the United States under the Acts hereby repealed," if it is applicable to suits on contracts of the Fleet Corporation at most gave an additional remedy against the United States and not a substi-

tute for existing remedies against the Fleet Corporation expressly preserved by subdivision (b) (2), *supra*. P. 527.
32 F. (2d) 680, affirmed.

CERTIORARI, 280 U. S. 544, to review a judgment of the Circuit Court of Appeals reversing a judgment of the District Court in a suit, brought originally in a state court, against the Fleet Corporation to cancel a contract, for duress and fraud, and to secure an accounting under earlier contracts. The District Court dismissed the bill upon the ground that the only remedy was against the United States, 26 F. (2d) 116. The Court of Appeals held otherwise, but limited the relief to an accounting under the contract sought to be canceled.

Mr. Claude R. Branch, Special Assistant to the Attorney General, with whom *Attorney General Mitchell* and *Messrs. J. Frank Staley, Erwin N. Griswold, Chauncey G. Parker*, General Counsel, Fleet Corporation, and *O. P. M. Brown*, Special Counsel, Fleet Corporation, were on the brief, for petitioner.

In executing the contract of March 26, 1920, the Fleet Corporation was acting as the agent of a disclosed sovereign principal. Besides disclosing in the description of the parties that it was acting solely in a representative capacity and solely on behalf of its principal, much of the subject matter of the contract relates to matters, such as the cancellation of contracts and the payments of just compensation therefor, with which the Fleet Corporation, under its corporate charter powers, had no concern. Moreover, the authority under which this public agent was acting existed by reason of Acts of Congress and Executive Orders, of which everyone was chargeable with notice.

When a public officer or agent acts in the line of his duty and by legal authority, his contracts, made on ac-

count of the Government, are public and not personal. They inure to the benefit of and bind the Government, not the agent. It can not matter that the public agent is a corporation rather than an individual.

In authorizing the President to delegate to such agencies as he might determine the power conferred on him for the production of ships for the use of the Nation in the war emergency, Congress did not intend that the public agents so selected should enter into contracts for the benefit of the United States upon the agents' own personal credit, nor that the enormous sums of public money appropriated were to be expended for the personal account of the agents; nor did Congress intend that such agents should be held personally liable for their lawful acts and engagements while so employed.

The decision of this Court in the *Sloan-Astoria* cases (258 U. S. 549; 295 Fed. 415) is not authority for holding the Fleet Corporation personally liable in this case, because the only question determined in those cases was the jurisdiction of the District Courts to entertain suits against the Fleet Corporation. The contract in this case differs in many particulars from the contract considered in the *Sloan-Astoria* cases.

The corporate liability of the Fleet Corporation to account to respondents in this suit, if any exists, must be predicated upon the contract of March 26, 1920, which the court below found was an accord and satisfaction of all prior demands. Since respondents have not asked for a review of that finding, they may not question it before this Court. If the court below was right in holding that the Fleet Corporation had made itself personally liable on the earlier contracts with the Groton Iron Works because of the frame of the earlier instruments, the contract of March 26, 1920, constituted a novation by the United States of any liability which previously may have been

incurred by the Fleet Corporation, and the Iron Works accepted the novation in full accord and satisfaction of all its rights arising from the earlier contracts.

If the form of the contracts involved in this case, in the light of the applicable statutory provisions, was not sufficient to exclude liability on the part of the Fleet Corporation, this liability was assumed and taken over by Congress on behalf of the United States, and the remedy provided by statute for the enforcement of this liability is exclusive. Merchant Marine Act.

Mr. Frederick H. Wood, with whom *Messrs. Herbert B. Lee, Richard S. Holmes, W. H. L. Edwards,* and *William W. Robison* were on the brief, for respondents.

Mr. Justice Stone delivered the opinion of the Court.

In this case certiorari was granted, 280 U. S. 544, to review a ruling of the Court of Appeals for the Second Circuit that the Fleet Corporation is subject to suit upon a contract which it entered into, acting as an agency of the United States under the Urgent Deficiencies Act of June 15, 1917, (40 Stat. 182) as amended.

On June 15, 1917, the Fleet Corporation contracted with Groton Iron Works for the construction of twelve wooden ships, reduced to eight by contract of September 30, 1918. On August 11, 1917, and April 20, 1918, contracts were executed, each for the construction of six steel ships. After the armistice the Fleet Corporation gave directions to suspend work on a part of the steel ships. The Iron Works became financially involved and, the Fleet Corporation having advanced large sums to it, negotiation for a settlement of various differences between the two corporations resulted in the contract between it and the Fleet Corporation of March 26, 1920. This

described the Fleet Corporation as " representing and acting . . . for and in behalf of the United States of America (hereinafter referred to as the owner)." It cancelled the earlier contracts, with some exceptions relating to the completion of the steel ships, and settled and released numerous other claims not now important, saving certain claims growing out of a reconciliation of accounts, then in progress, to determine the amount due for certain work on the wooden ships.

The Iron Works, before its bankruptcy, brought the present suit in the Superior Court of Connecticut, which was removed to the District Court for Connecticut, where, respondent, the trustee in bankruptcy, having intervened, the complaint was reframed so as to pray the cancellation of the contract of March 26, 1920, as procured by duress and fraud, an accounting and judgment for such amounts as should be found to be due for breach of the earlier contracts. A fourth separate defense, which alone is presently involved, set up that with respect to all the transactions alleged in the bill of complaint, petitioner acted solely as an agency of the United States, under powers delegated to it by the President under the Urgent Deficiencies Act, and that with respect to those transactions it was under no personal liability and respondent's only remedy was against the United States.

The District Court confirmed findings of a special master, in favor of petitioner, on the issues of fraud and duress and his conclusion that the rights of the parties were fixed by the contract of March 26, 1920, but gave judgment, sustaining the fourth defense and dismissing the complaint. 26 F. (2d) 116. The Court of Appeals reversed the judgment, holding that the suit might be maintained against the petitioner, but limited the relief to an accounting under the contract of March 26, 1920. 32 F. (2d) 680.

Concededly, as both courts below and the special master agree, in entering into the several contracts referred to, the Fleet Corporation was acting as an agency of the United States as alleged. But all of the contracts were signed and sealed by the Fleet Corporation, which was referred to as a corporation organized under the laws of the District of Columbia and which promised to pay the stipulated price for the ships and to perform the other obligations of the contracts, in terms imposed on it. They contained no words purporting to bind the United States or in terms restricting the liability of the petitioner.

One acting as a private agent may be bound, notwithstanding his known agency, upon contracts which he executes in his own name. *Sprague* v. *Rosenbaum,* 38 Fed. 386; *Guernsey* v. *Cook,* 117 Mass. 548; *Brown* v. *Bradlee,* 156 Mass. 28; *Sadler* v. *Young,* 78 N. J. L. 594; *McCauley* v. *Ridgewood Trust Co.,* 81 N. J. L. 86; *Jones* v. *Gould,* 200 N. Y. 18. See *Worthington* v. *Cowles,* 112 Mass. 30; *Kean* v. *Davis,* 20 N. J. L. 425; *Cream City Glass Co.* v. *Friedlander,* 84 Wis. 53. Compare *Whitney* v. *Wyman,* 101 U. S. 392; *Post* v. *Pearson,* 108 U. S. 418. The only question now presented is whether the quasi-public character of the Fleet Corporation and the duties imposed upon it as an agency of the United States by Acts of Congress and Executive Orders, described and considered in earlier opinions o this Court, require a different conclusion with respect to its contracts. Shipping Act of September 7, 1916, c. 431, 39 Stat. 728, 730–732; Urgent Deficiency Act of 1917, *supra*; Merchant Marine Act of June 5, 1920, c. 250, 41 Stat. 988; Executive Orders No. 2664, July 11, 1917, No. 2888, January 18, 1918, No. 3018, December 3, 1918, No. 3145, August 11, 1919, and see *The Lake Monroe,* 250 U. S. 246; *United States* v. *Strang,* 254 U. S. 491; *Sloan Shipyards* v. *Fleet Corporation,* 258 U. S. 549; *Skinner & Eddy Corporation* v. *McCarl,* 275 U. S. 1; *Emergency Fleet Corporation* v. *Western Union,* 275 U. S. 415, 421.

The petitioner contends that there is a strong presumption, which is here controlling, that a public officer or agent is not to be deemed bound as an individual upon his contracts made in behalf of the government in the performance of a public duty, since no one participating in such a contract would be justified in assuming, in the absence of a clearly expressed intention otherwise, that the officer intends to bind himself to defray public expense from his private purse. *Parks* v. *Ross*, 11 How. 361; *Hodgson* v. *Dexter Company*, 1 Cranch 345; *Sheets* v. *Selden's Lessee*, 2 Wall. 177; see *District of Columbia* v. *Camden Iron Works*, 181 U. S. 453, 459.

But we need not decide the point or attempt to draw the line where that presumption may be overcome by language of the written contract which falls short of an explicit limitation of the personal liability of the agent. See *Hodgson* v. *Dexter, supra*, 364. For in the present case the agent is not an individual and its liability does not involve any expenditure of private funds for the satisfaction of public obligations. Its entire capital stock is government owned. Its funds and property were furnished to it by the government. They and government indemnity are alone the sources from which its obligations will be defrayed.

It was created as a government agency to construct a fleet of vessels to meet a wartime emergency. It was in order better to fulfill that purpose that Congress chose an instrument having the power to contract, as well as all the other powers of a private corporation, but with its every action government-controlled and all its assets supplied from government sources. The advantages of resorting to such powers in meeting the national emergency were urged as grounds for the choice of this particular form of agency, when the Urgent Deficiency bill was pending in Congress. See remarks of Senator Underwood, reporting the bill for the Senate Conferees, 55

Cong. Rec. 65th Cong., p. 3549; see *The Lake Monroe, supra,* p. 254, *Skinner & Eddy Corporation* v. *McCarl, supra,* p. 8. There is thus no basis for presuming that the Fleet Corporation is not to be deemed bound by the contracts into which it enters merely because it is acting as such an agency, and its liability as measured by their terms is not to be curtailed by the presumption which, it is urged, may be indulged in favor of an individual acting for the government.

That is the effect of the decision in *Astoria Marine Works* v. *United States Shipping Board Emergency Fleet Corporation,* 258 U. S. 549, 569. It was there held that suit might be maintained against the Fleet Corporation in a district court upon a contract in form and in manner of execution like those presently involved and where, as here the Fleet Corporation was described in the contract as "representing the United States f America." It is true, as the petitioner argues, that the precise question at issue was one of jurisdiction of the district court to entertain the suit rather than the Court of Claims, as one against the Government. But the jurisdiction was sustained on the ground that the Fleet Corporation was bound by its contract, even though it acted as an agency of the United States and so was subject to the suit upon it in the District Court. The court said (p. 569): "The whole frame of the instrument [the contract] seems to us plainly to recognize the corporation as the immediate party to the contracts. . . . If we are right in this, further reasoning seems to us unnecessary to show that there was jurisdiction of the suit. The fact that the corporation was formed under the general laws of the District of Columbia is persuasive, even standing alone, that it was expected to contract and to stand suit in its own person, whatever indemnities might be furnished by the United States." See *United States* v. *Wood,* 290 Fed. 115, 263 U. S. 680.

Petitioner also insists that even though the Fleet Corporation is bound by its contracts, the liability has been undertaken by the United States by §§ 2(b) (1), 2(b) (2) and 2(c) of the Merchant Marine Act of June 5, 1920, 41 Stat. 988, which now affords the exclusive remedy for the enforcement of the liability. This legislation repealed, with certain specified exceptions, the Emergency Shipping Fund provisions of the Urgent Deficiencies Act of June, 1917, as amended. Section 2(b) (1) directed that "all contracts or agreements" previously made under the Emergency Shipping Fund legislation "be assumed and carried out by the United States Shipping Board." But § 2(b) (2) saved all rights or remedies accruing as a result of such contracts and provided that they "may be exercised in like manner, subject to the provisions of subdivision (c)" of § 2. Subdivision (c) directed the Board to settle "all matters arising out of or incident to the exercise by or through the President of any of the powers or duties imposed upon the President" by the earlier legislation "and for this purpose the Board, instead of the President, shall have and exercise any of such powers and duties relating to the determination and payment of just compensation." It further provided that "Any person dissatisfied with any decision of the Board shall have the same right to sue the United States as he would have had if the decision had been made by the President of the United States under the acts" repealed.

Petitioner points to no provisions of earlier acts giving to the President power to determine the amount due a contractor under a contract made by the Fleet Corporation, and respondent asserts that the powers of the President referred to in (c) are limited to the award of just compensation. But even if we assume that his powers were not so limited, we think subsection (c) at most, gave an additional remedy against the United States and not a substitute for existing remedies upon

contract liabilities expressly preserved by subdivision (b) (2). The words of subdivision (b) (2), saving all existing remedies which "may be exercised and enforced in like manner, subject to the provisions of subdivision (c)," must be taken to preserve the old remedies and to give the new one if the matter is one which the Board is authorized to settle by (c). Any other construction would nullify the saving clause of (b) (2), for if the "decision of the Board" as used in the proviso of (c) embraces settlements of all matters arising out of contracts which, by paragraph (b) (1), it was directed to carry out and in the event that its decision is not accepted, the exclusive remedy is by suit against the United States, then none of the remedies accruing under such contracts and in terms saved by paragraph 2, were preserved.

Affirmed.

RICHBOURG MOTOR COMPANY *v.* UNITED STATES.

DAVIES MOTORS, INCORPORATED, *v.* UNITED STATES.

CERTIORARI TO THE CIRCUIT COURTS OF APPEALS FOR THE FOURTH AND NINTH CIRCUITS RESPECTIVELY.

Nos. 452 and 569. Argued April 25, 1930.—Decided May 19, 1930.

Where a person, discovered in the act of transporting liquor unlawfully, has been arrested and the transporting vehicle seized under § 26 of the National Prohibition Act, proceedings to forfeit the vehicle must be taken under that section, which protects innocent lienors, and will not lie under Rev. Stats. § 3450. P. 532.
34 F. (2d) 38 and 35 *id.* 928, reversed.

CERTIORARI, 280 U. S. 549, and *post*, p. 707, to review judgments affirming forfeitures of automobiles under Rev. Stats. § 3450. The present petitioners intervened

in the District Court to set up their interests in the vehicles as innocent lienors. Their claims were rejected by the courts below as not permissible under the section mentioned.

Mr. Joseph G. Myerson, with whom *Messrs. Phillip W. Haberman, Charles G. Lee, Jr.,* and *R. R. Williams* were on the brief, for Richbourg Motor Company.

Mr. Duane R. Dills, with whom *Messrs. William K. Young* and *Berthold Muecke, Jr.,* were on the brief, for Davies Motors, Inc.

Assistant Attorney General Richardson, with whom *Solicitor General Thacher, Assistant Attorney General Youngquist, Messrs. Claude R. Branch,* Special Assistant to the Attorney General, and *Mahlon D. Kiefer,* were on the brief, for the United States.

MR. JUSTICE STONE delivered the opinion of the Court.

In these cases certiorari was granted, 280 U. S. 549, and *post,* p. 707, respectively, to pass on the question, whether proceedings for the forfeiture of a vehicle seized under § 26 of the National Prohibition Act,[1] as one used for

[1] Section 26, Title II, of the National Prohibition Act, c. 85, 41 Stat. 305, 315 (U. S. C., Title 27, Sec. 40):

"When the commissioner, his assistants, inspectors, or any officer of the law shall discover any person in the act of transporting in violation of the law, intoxicating liquors in any wagon, buggy, automobile, water or aircraft, or other vehicle, it shall be his duty to seize any and all intoxicating liquors found therein being transported contrary to law. Whenever intoxicating liquors transported or possessed illegally shall be seized by an officer he shall take possession of the vehicle and team or automobile, boat, air or water craft or any other conveyance, and shall arrest any person in charge thereof. Such officer shall at once proceed against the person arrested under the provisions of this title in any court having competent jurisdic-

unlawful transportation of intoxicating liquor, but where there has been no prosecution for that offense, must be had under that section, or whether they may be prosecuted under the provisions of R. S. § 3450.[2] The latter authorizes the forfeiture of vehicles used in the removal or concealment of any commodity with intent to deprive the United States of any tax upon it, which is made a criminal offense. The section does not, as does § 26, protect the interests of innocent lienors. *Goldsmith Grant Co.* v. *United States,* 254 U. S. 505; cf. *Van Oster* v. *Kansas,* 272 U. S. 465.

In each case the Court of Appeals answered the question by affirming a judgment of a district court, forfeiting, under § 3450, automobiles in which the petitioners,

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tion; but the said vehicle or conveyance shall be returned to the owner upon execution by him of a good and valid bond, with sufficient sureties, in a sum double the value of the property, which said bond shall be approved by said officer and shall be conditioned to return said property to the custody of said officer on the day of trial to abide the judgment of the court. The court upon conviction of the person so arrested shall order the liquor destroyed, and unless good cause to the contrary is shown by the owner, shall order a sale by public auction of the property seized, and the officer making the sale, after deducting the expenses of keeping the property, the fee for the seizure, and the cost of the sale, shall pay all liens, according to their priorities, which are established, by intervention or otherwise at said hearing or in other proceeding brought for said purpose, as being bona fide and as having been created without the lienor having any notice that the carrying vehicle was being used or was to be used for illegal transportation of liquor, and shall pay the balance of the proceeds into the Treasury of the United States as miscellaneous receipts. All liens against property sold under the provisions of this section shall be transferred from the property to the proceeds of the sale of the property. . . ."

[2] Section 3450, Revised Statutes (U. S. C., Title 26, Sec. 1181):

"Whenever any goods or commodities for or in respect whereof any tax is or shall be imposed, or any materials, utensils, or vessels proper or intended to be made use of for or in the making of such goods or commodities are removed, or are deposited or concealed in

respectively, asserted an interest as innocent lienors. *Richbourg Motor Co.* v. *United States* (4th Circuit), 34 F. (2d) 38; *Davies Motor Co.* v. *United States* (9th Circuit), 35 F. (2d) 928. In each a person operating an automobile belonging to another was arrested and arraigned before a United States Commissioner on a charge of illegal transportation of intoxicating liquor. The liquor and the car used for its transportation were seized by the officer making the arrest. The United States Attorney did not proceed with the prosecution of the charge, but procured the indictment and conviction of the prisoners, under § 3450, for removing and concealing spirits with intent to defraud the government of the tax.

The proceedings presently involved for the forfeiture of the vehicles were also had under that section. In each the respective petitioners intervened, setting up that they were lienors under conditional contracts of sale, to persons other than those arrested, and that petitioners and the conditional vendees were innocent of any participation in the unlawful acts charged. In No. 452 the court refused a request of petitioner to submit to the jury the question whether the seized automobile was used in the unlawful transportation of liquor and whether the

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any place, with intent to defraud the United States of such tax, or any part thereof, all such goods and commodities, and all such materials, utensils, and vessels, respectively, shall be forfeited; and in every such case all the casks, vessels, cases, or other packages whatsoever, containing, or which shall have contained, such goods or commodities, respectively, and every vessel, boat, cart, carriage, or other conveyance whatsoever, and all horses or other animals, and all things used in the removal or for the deposit or concealment thereof, respectively, shall be forfeited. And every person who removes, deposits, or conceals, or is concerned in removing, depositing, or concealing any goods or commodities for or in respect whereof any tax is or shall be imposed, with intent to defraud the United States of such tax or any part thereof, shall be liable to a fine or penalty of not more than five hundred dollars. . . ."

persons in the car were arrested at the time of its seizure, and refused a motion to dismiss the libel on the ground that by such arrest and seizure the government was bound to proceed for the forfeiture of the vehicle under § 26, and barred from proceeding under § 3450. In No. 569 trial was by the court without a jury, which found the facts as already stated, and decreed forfeiture of the vehicle under § 3450.

By § 5 of the Willis-Campbell Act of November 23, 1921, c. 134, 42 Stat. 222, 223, all laws relating to the manufacture, taxation and traffic in intoxicating liquors and penalties for their violation, in force when the National Prohibition Act was adopted, were continued in force except such provisions as are "directly in conflict with any provision of the National Prohibition Act."

In *United States* v. *One Ford Coupe,* 272 U. S. 321, it was held that there was no such direct conflict between § 26 and § 3450 as to preclude the forfeiture of the interest of an innocent lienor under the latter, where the intoxicating liquor was concealed in the seized vehicle with intent to defraud the government of the tax, and where it did not appear that there was transportation of the liquor. In *Port Gardner Investment Co.* v. *United States,* 272 U. S. 564, and in *Commercial Credit Co.* v. *United States,* 276 U. S. 226, it was held that prosecution and conviction of the offender for the transportation of intoxicating liquor under the Prohibition Act, barred forfeiture of the seized vehicle under § 3450, since the disposition of the vehicle after the conviction, prescribed by § 26, is mandatory. These cases left undetermined the question now presented, whether, under § 26, the mere arrest of the person discovered in the act of transportation, and the seizure of the transporting vehicle, bar the forfeiture under § 3450.

The language of § 26 is in form mandatory throughout. It is made the "duty" of the officer discovering any per-

son in the act of transporting liquor to seize the liquor, when "he shall take possession of the vehicle" and "shall arrest any person in charge" of it. He "shall at once proceed against the person arrested under the provisions of this title." The vehicle "shall be returned to the owner" upon his giving bond. "The court upon conviction of the person so arrested . . . shall order a sale by public auction of the property seized" and the officer making the sale "shall pay all liens which are established . . . as being bona fide and as having been created without the lienor having any notice that the carrying vehicle was being used or was to be used for illegal transportation of liquor. . . ." It is plain that, whenever the vehicle seized by the arresting officers is discovered in use in the prohibited transportation, literal compliance with these requirements would compel the forfeiture under § 26, with the consequent protection of the interests of innocent lienors. To that extent, § 26, if interpreted to exact such compliance, is in direct conflict with the forfeiture provisions of § 3450 and supersedes them whenever any person within the provisions of § 26 is discovered "in the act of transporting . . . intoxicating liquors in any . . . vehicle," which liquor is "removed . . . deposited or concealed . . . with intent to defraud the United States" of the tax.

But the government contends that § 26 is not to be read thus literally; that it was not intended by its mandatory phrases to do more than state generally the duty resting on all law enforcement officers to enforce the law, but which leaves them free, when the same act or transaction constitutes an offense under different statutes, to proceed under either one. It is argued that § 26 could not have been intended to preclude district attorneys from prosecuting violations of § 3450 merely because they involve transportation, and it can no less be taken to de-

prive them of their election to forfeit the offending vehicle under either section.

Undoubtedly, "shall" is sometimes the equivalent of "may" when used in a statute prospectively affecting government action. See *Railroad* v. *Hecht*, 95 U. S. 168; *West Wisconsin Ry. Co.* v. *Foley*, 94 U. S. 100, 103. The usual provisions of criminal statutes that the offender "shall" be punished as the statute prescribes is not necessarily to be taken, as against the government, to direct prosecution under that rather than some other applicable statute.

But the prescription in detail, by § 26, whenever transportation is involved, of successive steps to be taken which, if followed, lead unavoidably to forfeiture under that section and no other, with the important consequence of protecting the interests of innocent third persons, suggests a definite purpose to make the protection effective by bringing all forfeitures in such cases under its controlling provisions. If the purpose were the more general one of imposing on government officers the general duty to procure the forfeiture at their election, either under § 26 or any other applicable statute, most of the requirements of § 26 might have been omitted. The end sought could have been attained more easily by the simple enactment, in the language of § 3450, that the offending vehicle "shall be forfeited," saving the rights of innocent lienors if the proceeding were had under § 26.

It is to be observed that § 26 neither prohibits transportation of intoxicating liquors nor prescribes the punishment of the offender. That is provided for in §§ 3 and 29, as amended by the Jones Act (45 Stat. 1446). The general duty of investigating and reporting violations of § 3, as well as other sections of the National Prohibition Act, to United States Attorneys, is imposed on all prohibition officers by §§ 2 and 29. That duty is mandatory. *Donnelley* v. *United States*, 276 U. S. 505. The general

duty to prosecute all criminal offenses is imposed on district attorneys by R. S. § 777. The objective of § 26 is not the prosecution of the offender, elsewhere provided for, but the confiscation of the seized liquor and the forfeiture of vehicles used in its transportation, to the limited extent specified in the section. Every act which it enjoins on public officials is directed to that end.

In providing for forfeitures under this section, Congress was not unaware that the enactment of the National Prohibition Act would enormously increase seizures of vehicles, beyond those made under § 3450, and that their forfeiture would place an increased and heavy burden on many innocent persons, unless afforded some protection by the new legislation. By § 26 it gave such protection in all cases where the prosecution of the person guilty of the transportation is had under the National Prohibition Act. This would have been but an idle gesture and the Congressional purpose would have been defeated if, in practically every case where the transporting vehicle is seized, the prosecuting officers could compel forfeiture of the interests of innocent third persons under § 3450. Yet, that is the effect of the construction of § 26 contended for by the government, since, with the enactment of national prohibition, there can be few cases of illegal transportation which do not involve the concealment of non-tax-paid liquor. See *One Ford Coupe* v. *United States, supra,* p. 326.

We think that Congress did not take the precaution to enact the carefully chosen language of § 26 merely to impose general duties on prosecuting officers already placed on them by other sections of the Act, but that its purpose was to preclude the nullification of the protection which § 26 had extended to innocent third persons.

This Court has already held that the provision in § 26 that "The court, upon the conviction of the person so

arrested, shall . . . order a sale by public auction of the property seized" is mandatory and requires the forfeiture to proceed under that section. *Port Gardner Investment Co.* v. *United States, supra; Commercial Credit Co.* v. *United States, supra.* No tenable ground of distinction is suggested which would enable us to say, where forfeiture is involved, that the preceding requirement of the section, that the proceedings against the person arrested "shall be under the provisions of this title," is any less so.

The conclusion we reach is not without support in the legislative history of § 26. The clause protecting the interests of innocent lienors was added by amendment in the House of Representatives to H. R. 6810, which became the National Prohibition Act. The sponsor for the amendment pointed out that the procedure prescribed by the section as originally drawn protected the interests of the innocent owner and stated that the amendment was designed to save from forfeiture the interests of innocent lienors and innocent owners alike. Congressional Record, 66th Cong., 1st Sess., Vol. 58, Pt. 3, p. 2902, July 19, 1919.

Report No. 151 of the Senate Judiciary Committee on this bill, August 18, 1919, 66th Cong., 1st Sess., stated that the "seizure of any vehicle in which liquor is being transported in violation of law, together with liquor being transported, is authorized, as well as the arrest of the person engaged in such illegal transaction, the property seized to be disposed of under the direction of the court, as provided in § 26."

We are of opinion that under § 26 it is the duty of prohibition officers to arrest any person discovered in the act of transportation and to seize the transporting vehicle; that such arrest and seizure require the government to proceed for forfeiture of the vehicle under § 26. It is unnecessary to say whether, if for any reason the seizure

cannot be made or the forfeiture proceeded with, prosecution for any offense committed must be had under the National Prohibition Act rather than other statutory provisions.

Reversed.

BROAD RIVER POWER COMPANY ET AL. v. SOUTH CAROLINA EX REL. DANIEL, ATTORNEY GENERAL.

CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA.

No. 528. Argued May 2, 1930.—Decided May 19, 1930.

1. Upon review of a decision of a state court denying the existence under the local law of a right alleged to exist under that law and for which protection was claimed under the Federal Constitution, the province of this Court is to inquire whether the decision rests upon a fair or substantial basis; and if there was no evasion of the constitutional issue, and the non-federal ground has fair support, this Court will not inquire whether the rule applied by the state court is right or wrong, or substitute its own view of what should be deemed the better rule for that of the state court. P. 540.
2. Two South Carolina corporations, one of them with a franchise to establish and operate an electric street railway and power system upon condition that the railway be in operation within five years, and the other with a franchise to sell and distribute electricity for light and power and for that purpose to erect poles and conductors, were consolidated under a special act of the legislature, in a new corporation, whose franchises and privileges were granted for its corporate life, extending beyond the lives of the other companies. Under the consolidation act the franchises of the old companies were consolidated and became vested in the new one. The new company established a street railway and an electric power and lighting plant, using, so far as practicable, the same poles, wires and rights of way for both systems, and for forty years operated the properties as one business. In a suit brought by the State, the South Carolina Supreme Court decided that, by virtue of the consolidation, the privilege of operating the street railway was in-

separable from that of operating the electric power and light system; that together they constituted a unified franchise, which could not be abandoned in part and retained in part without the consent of the State, and that, so long as the company retained and operated its electric power and light system, it could not be permitted to abandon its street railway system.

Held, that it can not be said that this interpretation of the state statutes so departs from established principles as to be without substantial basis. P. 541.

3. Franchises are to be strictly construed, and that construction adopted which works least harm to the public. P. 543.
4. A corporation operating an electric railway and an electric power and light plant under an inseparable franchise from a State, may constitutionally be forbidden by the State to abandon the railway while continuing the other business. *Id.*
5. The order compelling the operation of the railway in this case does not involve a determination whether or not the rate is confiscatory, nor does it foreclose a consideration of that question upon appropriate proceedings. P. 544.
6. A legislative act (So. Car. Acts of 1925, p. 842) whose dominant purpose was to effect a merger or consolidation of named corporations, and which authorizes the transfer of all or any part of their franchises, providing, however, that the company acquiring any franchise shall take it subject to the restrictions, requirements and conditions therein contained, reasonably may be deemed to preclude the breaking up of a unified franchise in such manner as to do away with obligations imposed by it, no purpose to permit this being disclosed in the body of the Act. Pp. 544–547.
7. The fact that Acts for the merger of corporations and transfers of franchises are commonly prepared by those interested in the benefits to be derived from them, and that the public interest requires that they should be in such unequivocal form that the legislative mind may be impressed with their character and import so that privileges may be intelligently granted or purposely withheld, has firmly established the rule that they must be strictly construed, and that any ambiguity or doubts as to their meaning and purpose must be resolved in favor of the public interest. P. 548.
8. Writ of certiorari to review a judgment of a state court, *dismissed* because the judgment was supported by a substantial, non-federal ground. *Id.*

Writ of certiorari to 157 S. C. 1, dismissed.

CERTIORARI, 280 U. S. 551, to review a judgment of the Supreme Court of South Carolina, in the nature of mandamus, to compel the operation of an electric street railway. [Rehearing granted, October 13, 1930.]

Mr. William Marshall Bullitt, with whom *Messrs. C. Edward Paxson, George M. Le Pine,* and *W. C. McLain* were on the brief, for petitioners.

Messrs. Cordie Page, Assistant Attorney General of South Carolina, and *Irvine F. Belser,* with whom *Messrs. John M. Daniel,* Attorney General, *C. T. Graydon, W. S. Nelson, E. W. Mullins,* and *H. N. Edmunds* were on the brief, for respondent.

MR. JUSTICE STONE delivered the opinion of the Court.

This case is here on certiorari, 280 U. S. 551, to review a judgment of the Supreme Court of South Carolina, adjudging the petitioners, the Broad River Power Company and its subsidiary, the Columbia Railway Gas & Electric Company, to be jointly responsible for the operation of an electric street railway system in Columbia, South Carolina, and directing them to resume its operation, which they had abandoned. The proceeding, in the nature of mandamus, was brought in the state Supreme Court to compel the operation of the system by petitioners. By their answer they set up that the railway was being operated by the Railway Company at a loss under a franchise separate and distinct from the franchise to make and distribute electric light and power of the Broad River Power Company, whose business is concededly profitable; that the continued operation of the railway under compulsion of the court would deprive respondents of their property without due process of law in violation of the Fourteenth Amendment of the Federal Constitution.

The Supreme Court, upon consideration of the evidence taken before a referee, held (a) that although the books of the street railway showed large financial losses, it could be operated at a profit if properly managed; (b) that the charter and certain city ordinances under which the street railway system was constructed and operated, and certain extension-line and right-of-way agreements, are effective as contracts imposing on petitioners a duty to operate the system; and, (c) that the privilege of operating the street railway is inseparable from that of operating the electric power and light system, and that together they constitute a unified franchise, which cannot be abandoned in part and retained in part without the consent of the state; that so long as respondents retain and operate their electric power system they cannot be permitted to abandon their street railway system. Each of these conclusions is sharply challenged by respondents, but, in the view we take, only the third need be considered here.

Whether the state court has denied to rights asserted under local law the protection which the Constitution guarantees is a question upon which the petitioners are entitled to invoke the judgment of this Court. Even though the constitutional protection invoked be denied on non-federal grounds, it is the province of this Court to inquire whether the decision of the state court rests upon a fair or substantial basis. If unsubstantial, constitutional obligations may not be thus evaded. *Fox River Paper Co.* v. *Railroad Commission of Wisconsin,* 274 U. S. 651, 655; *Ward* v. *Love County,* 253 U. S. 17, 22; *Enterprise Irrigation District* v. *Canal Co.,* 243 U. S. 157, 164. But if there is no evasion of the constitutional issue, *Nickel* v. *Cole,* 256 U. S. 222, 225; *Vandalia Railroad* v. *City of South Bend,* 207 U. S. 359, 367; and the non-federal ground of decision has fair support, *Fox River Paper Co.* v. *Railroad Commission, supra,* 657; *Enterprise Irrigation District* v. *Canal Co., supra; Leathe* v. *Thomas,*

207 U. S. 93; *Vandalia Railroad Co.* v. *City of South Bend, supra; Sauer* v. *New York,* 206 U. S. 536, this Court will not inquire whether the rule applied by the state court is right or wrong, or substitute its own view of what should be deemed the better rule, for that of the state court.

The predecessor in interest of the Columbia Electric Gas & Railway Company, the petitioner, was incorporated in 1890 by special act of the legislature, S. C. Acts of 1890, p. 969, under the name of Columbia Electric Street & Suburban Railway & Electric Power Company, later changed to The Columbia Electric Street Railway Light & Power Company, called the Consolidated Company and, still later, in 1911, changed to its present name. Its corporate life was fixed at thirty years and it was given power, upon the consent of the city council, to construct or acquire railway tracks through any streets of the City of Columbia, to extend them into the country a distance of five miles from the state capital, and to operate cars with electric power over its tracks for the transportation of passengers and freight and to contract for and provide electric power for any other purpose. The act was continued in force provided the "Company begins to operate its railways in said city within five years."

An act of December 16, 1891, S. C. Acts of 1891, p. 1453, authorized the consolidation of this company with the Congaree Gas & Electric Company. The latter had been incorporated under the Act of December 24, 1887, S. C. Acts of 1887, p. 1103, for a period of thirty years, with the power, not now involved, to manufacture and distribute gas, and power to sell and distribute light, power and heat "made from electricity," and for that purpose, subject to municipal ordinances, to erect poles and conductors. The Consolidation Act recited that these two companies had agreed to consolidate their franchises and privileges and authorized them to do so by

transfer of their property, franchises, and privileges by deed of indenture to the new consolidated company. This company was incorporated for fifty years, with the usual corporate powers. The act provided that it should be vested with the franchises and subject to the liabilities of the consolidated companies. It was also authorized to acquire the property and franchise of the Columbia Street Railway Company, incorporated for thirty years by Act of February 9, 1882, with a franchise to operate horse cars over tracks in the city streets.

The consolidation was effected as authorized. The Consolidated Company acquired the line of street railway of the horse car company, established electric power plants and, under authority of City Ordinance, §§ 561, 562, of 1892, laid additional tracks and electrified the system by erecting poles and wires in the streets, also, so far as practicable, using them and its rights of way in its electric light and power business. From the organization of the Consolidated Company until 1925, both the street railway and power business of the Consolidated Company were expanded as a single business, its capital stock was increased from time to time, and the system of accounts was such that it did not disclose whether its power system was constructed more from the proceeds of its street railway or its power business.

Certain facts in this recital of corporate history are of persuasive if not controlling significance in determining the status of the franchise of the Consolidated Company. The Consolidated Company was a new corporation. Its franchises and privileges were granted for its corporate life, extending beyond the duration of the franchises of the two companies consolidated, all of which would have expired before 1921. It had acquired the franchises of the two consolidated companies, one in terms a franchise to operate a railway and a power system, the railway system being for practical purposes dependent upon the

power system for its operation, and the privilege of operating both being conditional upon the establishment of the railway system within five years. The Consolidation Act plainly looked to a consolidation of the franchises by the two companies. None of the special legislative acts defining the privileges conferred upon these several corporations contains any words affirmatively providing that any part of the privileges granted should be deemed separable, or that they might be exercised independently of any other.

The Supreme Court of South Carolina, in referring to this corporate history and the effect of the Consolidation Act said: "When the new company, in compliance with this Act, effected the consolidation and in pursuance of the provisions of the Act built, constructed and operated its electric railway and power properties as parts of one business for nearly forty years, these rights, powers and privileges became inseparably bound together and cannot be separated. As contended by the petitioners [respondents here], such diversity as there was in the conditions of the former franchises became obliterated and extinguished by the major purpose of the new act, namely, the consolidation of all the powers in one company for the greater benefit of the public."

In the light of the familiar rule that franchises are to be strictly construed, and that construction adopted which works the least harm to the public, see *Blair* v. *Chicago*, 201 U. S. 400, 471; *Fertilizing Co.* v. *Hyde Park*, 97 U. S. 659, 666; *Slidell* v. *Grandjean*, 111 U. S. 412, we cannot say that this interpretation of statutes of the State of South Carolina, by its highest court, so departs from established principles as to be without substantial basis, or presents any ground for the protection, under the Constitution, of rights or immunities which the state court has found to be non-existent. It follows that it was within the constitutional power of the State to refuse to

permit any partial abandonment of the consolidated franchise. *United Fuel Gas Co.* v. *Railroad Commission of Kentucky,* 278 U. S. 300, 308; *Fort Smith Light & Traction Co.* v. *Bourland,* 267 U. S. 330; *Puget Sound Traction Co.* v. *Reynolds,* 244 U. S. 574; *Ches. & Ohio Ry.* v. *Public Service Comm.,* 242 U. S. 603; *Mo. Pac. Ry. Co.* v. *Kansas,* 216 U. S. 262, 277. See *Woodhaven Gas Light Co.* v. *Public Service Comm. of N. Y.,* 269 U. S. 244; *N. Y. & Queens Gas Co.* v. *McCall,* 245 U. S. 345; *Atlantic Coast Line* v. *North Carolina Corporation Commission,* 206 U. S. 1, 25.

Brooks-Scanlon Co. v. *Railroad Comm.,* 251 U. S. 396, upon which petitioners rely, is not apposite. It was there held that where a railroad serving the public is owned and operated by a corporation which also conducted a private business, it is the business of the Railroad and not the entire business of the Company which determines whether the Railroad franchise may be abandoned as unprofitable. The private business was not devoted to a public use or a part of the public franchise. Nor, as petitioners contend, are we here concerned with the rule that a public service company may not be compelled to serve, even in a branch of its business, at a rate which is confiscatory. See *Northern Pacific R. R. Co.* v. *North Dakota,* 236 U. S. 585. The order compelling petitioners to serve does not involve a determination whether or not the rate is confiscatory, nor does it foreclose a consideration of that question upon appropriate proceedings. *Woodhaven Gas Light Co.* v. *Public Service Comm'n of N. Y., supra,* 249.

But petitioners contend that, even if the franchise of the Consolidated Company be deemed a unified one, the privilege of operating the street railway system was separated from the franchise to operate the power system by the corporate reorganization under the so-called Merger Act of March 19, 1925, S. C. Acts of 1925, p. 842.

The passage of this Act was procured by those interested in promoting the interests of the Consolidated Company and its subsidiaries, apparently for the purpose of facilitating the financing of the power business apart from the street railway business. It is entitled "An Act to authorize" the Consolidated and six other named companies, or any of them, "to merge, consolidate or sell, transfer and convey all or any part of their respective properties, assets, franchises, and charter or other rights to one or more of them or to the Broad River Power Company . . . and to authorize the Broad River Power Company . . . or any one or more of them to merge, consolidate or purchase the same, and to vest in the said Broad River Power Company or any other of said companies the property, assets, franchises and charter or other rights so sold, transferred, conveyed, merged, consolidated or purchased . . ." Section 1, entitled "Merger of certain corporations authorized," permits the named companies or any of them "to merge or consolidate with or to sell, transfer and convey to any one or more of them or to the Broad River Power Company all or any part of their respective properties, assets, franchises . . . and each and every of said companies and the Broad River Power Company are hereby authorized to merge and consolidate with or to purchase and to receive and hold all or any part of the properties, assets, franchises . . . so sold, transferred and conveyed. . . ." Section 2 declares "that in furtherance of the purpose of § 1 . . . all franchises heretofore granted by the state to any of the said companies may be transferred and assigned in pursuance of the provisions of § 1 of this Act," and that the company to which the transfer is made "shall hold the same with all the rights, powers and privileges granted to the original holder thereof, subject only to the restrictions, requirements and conditions in said franchises contained."

The Broad River Power Company had been organized in July, 1924, for the purpose of acquiring the entire outstanding capital stock of the Consolidated Company. Proceeding under the Merger Act, all the property and franchises of the six subsidiaries, excepting only the street railway property and so much of its franchises as authorized it to operate and maintain its street railway system, were vested in the Broad River Company. That company thus acquired the entire power business, leaving only the street car business and property in the Consolidated Company. The deed, however, expressly conveyed to the Broad River Power Company all its poles, including those used for the street railway, which carried both the trolley wires for the operation of the street railway and those for the transmission of other electric power. The Broad River Power Company then issued its own stock to the extent of approximately three and a half million dollars in exchange for the common stock of the Consolidated Company and one of its subsidiaries, and for certain cash subscriptions. After the acquisition of the common stock of the Consolidated Company by the Broad River Company, the capital stock of the former was reduced to a relatively nominal amount, all of which was held by the Broad River Company except 190 shares of preferred stock which remained outstanding. The record indicates that the petitioners have deposited a fund in a special bank account for the retirement of this stock. Since this reorganization the same persons have been executive officers of the Broad River Company and the Consolidated Company, and for all practical purposes the railway business of the Consolidated Company has been carried on as a branch or department of the Broad River Power Company.

Upon these and more detailed findings of fact, both the referee and the state court held that the reorganization resulted in a merger by which all the properties and

franchises of the several companies concerned were brought under the complete domination and control of the Broad River Power Company, which carried on the street railway branch of its business through the merely nominal agency of the Consolidated Company. For that reason the Supreme Court reached the conclusion that there had been no effective splitting up of the franchise or the public obligations of the Consolidated Company, and that they had devolved upon the Broad River Power Company, which was liable to carry out the obligation of the Columbia Gas & Electric Company to furnish an electric street railway service.

But we need not consider this aspect of the case, for we think that there was substantial basis for the further conclusion of the state court that the Merger Act cannot be taken to authorize the breaking up of the unified franchise of the Consolidated Company in such manner as to relieve it or any successor company from its duties and obligations as they existed before the merger. Nowhere in this legislation is there any affirmative disclosure of a purpose to relieve any of the corporations of existing duties and obligations or to enlarge their privileges. As appears from the title of the act and also that of § 1, the dominant purpose was to effect a merger or consolidation. The authority given by § 1 to transfer "all or any part" of the franchises affords but slender basis for the argument that there was any purpose to effect such a separation. The use of this phrase seems only subsidiary to the dominant purpose to authorize a merger or consolidation. It is not repeated or in terms referred to in § 2, which deals with franchises, and it is declared to be in furtherance of the purpose of § 1. In any case, the limitation in this section that the company acquiring any franchise shall take it subject to existing restrictions, requirements and conditions may, we think, reasonably be deemed to preclude the possibility of relieving from franchise duties

and obligations when no such purpose is disclosed in the body of the legislative act.

The very fact that legislative acts of this character are commonly prepared by those interested in the benefits to be derived from them, and that the public interest requires that they should be in such unequivocal form that the legislative mind may be impressed with their character and import so that privileges may be intelligently granted or purposely withheld, has firmly established the rule that they must be strictly construed, and that any ambiguity or doubts as to their meaning and purpose must be resolved in favor of the public interest. See *Blair* v. *Chicago, supra,* 471; *Fertilizing Company* v. *Hyde Park, supra,* 666. "The rule is a wise one; it serves to defeat any purposes concealed by the skillful use of terms to accomplish something not apparent on the face of the Act and thus sanctions only open dealing with legislative bodies." *Slidell* v. *Grandjean, supra,* 438.

We conclude that the judgment below is supported by a state ground which we may rightly accept as substantial.

Dismissed.

TEXAS & NEW ORLEANS RAILROAD COMPANY ET AL. *v.* BROTHERHOOD OF RAILWAY & STEAMSHIP CLERKS ET AL.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 469. Argued May 1, 2, 1930.—Decided May 26, 1930.

1. This Court accepts findings of fact in which the two lower federal courts concur, unless clear error is shown. P. 558.
2. Evidence in this case supports the conclusion of the courts below that the defendant Railroad Company and its officers were ac-

tually engaged in promoting the organization of an association of its clerical employees in the interest of the Company and in opposition to the plaintiff labor organization, and that these activities constituted an actual interference with the liberty of the clerical employees in the selection of representatives for the purposes set forth in the Railway Labor Act of May 20, 1926. P. 559.

3. A statute ought to be so construed that, if it can be prevented, no clause shall be treated as superfluous, or insignificant, or intended to be without effect. P. 568.

4. While an affirmative declaration of duty contained in a legislative enactment may be of imperfect obligation because not enforceable in terms, a definite statutory prohibition of conduct which would thwart the declared purpose of the legislation cannot be disregarded. *Id.*

5. The Railway Labor Act of 1926, while elaborating a plan for amicable adjustments and voluntary arbitration of disputes between common carriers and their employees, imposed certain definite obligations enforceable by judicial proceedings, one of which is found in the provision of subdivision 3 of § 2, that "Representatives, for the purposes of this Act, shall be designated by the respective parties . . . without interference, influence, or coercion exercised by either party over the self-organization or designation of representatives by the other." P. 567.

6. The word "influence," as used in this provision, is not to be taken as interdicting the normal relations and innocent communications which are part of all friendly relations between employer and employee; it means pressure—the use of the authority or power of either party to induce action by the other in derogation of what the statute calls "self-organization." P. 568.

7. The phrase "interference, influence or coercion" covers the abuse of relation or opportunity so as to corrupt or override the will. *Id.*

8. Freedom of choice in the selection of representatives on each side of the dispute is essential to the statutory scheme. All the proceedings looking to amicable adjustments and to agreements for arbitration of disputes—the entire policy of the Act—must depend for success on the uncoerced action of each party to the end that agreements satisfactory to both may be reached and the peace essential to the uninterrupted service of the instrumentalities of interstate commerce may be maintained. *Id.*

9. As the prohibition was appropriate to the aim of Congress and is capable of enforcement, the conclusion must be that enforcement was contemplated. P. 569.

10. The creation of an enforceable statutory right is not dependent on the existence of a statutory penalty for its violation. P. 569.

11. As applied against interference by an interstate railroad company with the lawful right of its employees to organize and select representatives for the purposes of the Act, the prohibition of § 2, *supra*, is within the power of Congress to regulate interstate commerce. P. 570.

12. Since the prohibition does not interfere with the normal exercise of the right of the carrier to select its employees or to discharge them, and, since the carrier has no right to interfere with the freedom of the employees to select their representatives, there is no ground for the carrier to complain that the prohibition violates the Fifth Amendment. *Adair* v. *United States*, 201 U. S. 161; *Coppage* v. *Kansas*, 236 U. S. 1, distinguished. *Id.*

13. The interest of employees in the selection of representatives to confer with their employer about contracts of service, is a property interest sufficient to satisfy § 20 of the Clayton Act, which provides that no injunction shall be granted in any case growing out of a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property or to a property right. P. 571.

14. *Quaere:* Whether § 20 of the Clayton Act limits the authority of the court to restrain the violation of an explicit provision of an Act of Congress, where an injunction would otherwise be the proper remedy. *Id.*

33 F. (2d) 13, affirmed.

CERTIORARI, 280 U. S. 550, to review a decree of the Circuit Court of Appeals which affirmed a decree of the District Court permanently enjoining the Railroad Company and other defendants, from interfering with, influencing, intimidating, or coercing certain employees with respect to their right to select representatives for the purpose of considering and deciding all disputes between them and the company, and with respect to their right of "self-organization." There was also a preliminary injunction and a contempt order resulting from its violation. See 24 F. (2d) 426; 25 *id.* 873, 876.

Mr. J. H. Tallichet, with whom *Messrs. C. R. Wharton, John P. Bullington, Calvin B. Garwood, H. M. Garwood,* and *Walker B. Spencer* were on the brief, for petitioners.

Mere suggestion or advice by officers and agents of the railroad to employees with respect to their organization or selection of representatives, is not unlawful, nor violative of the Railway Labor Act of 1926, nor subject to be enjoined.

The provisions of the Transportation Act, 1920, including the rules of the Labor Board, which were construed by this Court in the *Pennsylvania Railroad Cases,* 261 U. S. 72 and 267 U. S. 203, are so nearly identical with those of the Railway Labor Act, 1926, that those cases are decisive of every question in the case.

A court of equity cannot be invoked to determine an abstract right, the enforcement of which can lead to no definite result.

Insofar as the statute undertakes to prevent either party from influencing the other in the selection of representatives, it is unconstitutional and seeks to take away an inherent and inalienable right. The decisions below are contrary to the decisions of this Court in *Adair* v. *United States,* 201 U. S. 161, and *Coppage* v. *Kansas,* 236 U. S. 1, and violative of the Fifth Amendment. Cf. dissenting opinion of Brandeis, J., in *Hitchman Coal & Coke Co.* v. *Mitchell,* 245 U. S. 229, 271.

Section 52, Title 29, of the United States Code, which was § 20 of the Clayton Act, prohibits the granting of an injunction in this case.

The recognition of the Association was legally justified and was not a violation of the temporary injunction which the court had granted, though it be conceded for the sake of argument that the injunction was lawfully granted.

The contempt order broadens the injunction and, in a purely retroactive way, condemns and punishes for things that the injunction did not prohibit.

Retention of officers of the Brotherhood on seniority rosters while devoting their entire time to their organization, and granting them free passes and other gratuitous benefits, were mere favors, revocable at the pleasure of the employer. Their revocation was in the exercise of constitutional rights of the employer and its officers, and the order of the District Court requiring their continuance deprived petitioners of their property without due process of law, and of the equal protection of the laws. The court had no power to restore a status resting on no legal right.

Discharge of employees for causes wholly disconnected with the labor dispute, and necessary, in the opinion of supervising officers of the railroad, in the maintenance of discipline, could not be a violation of the injunction against interference, influence and coercion in their right of organization and selection of representatives. The railroad has the right to discharge employees for any cause, or (though it does not exercise it) for no cause. The order of the District Court requiring the restoration of the discharged men to the service, with pay for time lost, deprived petitioners of their property without due process of law and deprived them of the equal protection of the laws.

The injunctions, temporary and perpetual, are framed in such general language, and so interpreted and enforced by the District Court, that they keep petitioners in constant jeopardy of contempt with no basis for determining what action in the management and operation of the railroad may be a violation of the injunction.

Messrs. Donald R. Richberg and *John H. Crooker,* with whom *Mr. Carl G. Stearns* was on the brief, for respondents.

Congress intended in the Railway Labor Act of 1926 to provide for the prompt disposition of disputes between carriers and their employees by the making of enforceable contracts. § 2, par. First.

In order to make such contracts effective and enforceable, Congress provided that they must be made between duly authorized representatives of the contracting parties. § 2, par. Second.

In order to prevent fraud in the making of such contracts, and to protect their enforceability, Congress provided that neither contracting party should interfere with the self-organization or designation of representatives by the other. § 2, par. Third. Cf. *Hitchman Coal & C. Co.* v. *Mitchell,* 245 U. S. 229, 250.

A review of forty years of federal legislation to protect interstate commerce, and particularly railroad transportation, from injuries caused by labor disputes, leads to the inevitable conclusion that Congress, in passing the Railway Labor Act of 1926 to promote and protect collective bargaining, recognized that the rights of employees freely to organize and designate *bona fide* representatives must be written into statutory law, for the very purpose of insuring the protection of these rights in the courts of the United States.

The right of railway employees to organize and to designate representatives, and the duty of railway employers to refrain from interfering with self-organization and designation of representatives by employees, are legally enforceable,—even though the statute makes no explicit provision as to a remedy for their viola-

tion. See opinion in this case; *Texas & N. O. R. Co.* v. *Brotherhood of Clerks,* 33 F. (2d) 13; 1 Corpus Juris 986; *International News Service* v. *Associated Press,* 248 U. S. 215.

If resort to extraneous sources of construction is necessary to clarify the intention of Congress, it is made apparent from the reports of the Committees of both Houses, and from the statements of those in charge of the legislation, that Congress intended to make enforceable numerous mandatory provisions of the Act, including those involved in this case.

The Railway Labor Act, in imposing legally enforceable rights and duties upon carriers and employees in § 2, does not violate any constitutional limitation, but on the contrary provides protection for constitutional liberty of contract and rights of property.

Such restraints upon an absolute liberty of contract as are imposed by the Act, alike upon employers and employees, are only requirements necessary to safeguard the public interest and to provide for the exercise of the rights of one party with reasonable regard for the conflicting rights of others. Such restrictions are necessary and constitutional. *Chicago, B. & Q. R. Co.* v. *McGuire,* 219 U. S. 549; *Hitchman Coal Co.* v. *Mitchell,* 245 U. S. 229; *Highland* v. *Russel Co.,* 279 U. S. 253.

Mr. Chief Justice Hughes delivered the opinion of the Court.

This suit was brought in the District Court by the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, Southern Pacific Lines in Texas and Louisiana, a voluntary association, and H. W. Harper, General Chairman of its System Board of Adjustment, against the Texas and New Orleans Railroad Company, and certain officers and agents of that Company, to obtain an injunction restraining the defend-

ants from interfering with, influencing or coercing the clerical employees of the Railroad Company in the matter of their organization and designation of representatives for the purposes set forth in the Railway Labor Act of May 20, 1926, c. 347, 44 Stat. 577; U. S. C., Tit. 45, secs. 151–163.

The substance of the allegations of the bill of complaint was that the Brotherhood, since its organization in September, 1918, had been authorized by a majority of the railway clerks in the employ of the Railroad Company (apart from general office employees) to represent them in all matters relating to their employment; that this representation was recognized by the Railroad Company before and after the application by the Brotherhood in November, 1925, for an increase of the wages of the railway clerks and after the denial of that application by the Railroad Company and the reference of the controversy by the Brotherhood to the United States Board of Mediation; that, while the controversy was pending before that Board, the Railroad Company instigated the formation of a union of its railway clerks (other than general office employees) known as the "Association of Clerical Employees—Southern Pacific Lines"; and that the Railroad Company had endeavored to intimidate members of the Brotherhood and to coerce them to withdraw from it and to make the Association their representative in dealings with the Railroad Company, and thus to prevent the railway clerks from freely designating their representatives by collective action.

The District Court granted a temporary injunction.[1] Thereafter the Railroad Company recognized the Asso-

[1] The injunction order provided as follows:

"That the defendant Texas and New Orleans Railroad Company (a corporation and common carrier owning, leasing, and operating certain railroads throughout the States of Texas and Louisiana), its officers, servants, and agents are hereby enjoined and restrained from in any way or manner interfering with, influencing, intimidating, or

ciation of Clerical Employees—Southern Pacific Lines as the representative of the clerical employees of the Company. The Railroad Company stated that this course was taken after a committee of the Association had shown authorizations signed by those who were regarded as constituting a majority of the employees of the described class. The subsequent action of the Railroad Company and its officers and agents was in accord with this recognition of the Association and the consequent non-recogni-

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coercing plaintiffs or any of the approximately seventeen hundred clerical employees (and being the clerical employees described and referred to in plaintiffs' petition, which includes approximately seventeen hundred railroad clerks in the employ of the defendant Railroad Company on its lines throughout the States of Texas and Louisiana, except such clerical employees as are employed and engaged in its general office in the City of Houston, Texas, and in its general office in the City of New Orleans, Louisiana), with respect to their free and untrammeled right of selecting or designating their representatives for the purpose of considering and deciding any and all disputes between said clerical employees and the defendant Railroad Company; and further enjoining and restraining said defendant Railroad Company, its officers, servants, and agents from in any way or manner interfering with, influencing, intimidating, or coercing plaintiffs or any of said clerical employees herein referred to of their free and untrammeled right of self-organization.

"Nothing in this injunction shall be considered or construed as authority to prevent any employee of said defendant Railroad Company, in the class referred to, from organizing, joining, promoting, or fostering as many unions as he or they (meaning such employees in the class referred to) may desire, and in any way which he or they may desire, and with the assistance and aid of any of his fellow employees in any way and to any extent that said fellow employees (in the class referred to) may desire; nor shall anything in this injunction be considered or construed as authority or permission for any officer or agent of said company, or any employee, acting for or on behalf of the defendant Roalroad Company, attempting to influence or to interfere with said selection or designation of their said representatives, or their right to self-organization as herein referred to, upon any pretext that they are acting individually and not as representatives of said defendant corporation."

tion of the Brotherhood. In proceedings to punish for contempt, the District Court decided that the Railroad Company and certain of its officers who were defendants had violated the order of injunction and completely nullified it. The Court directed that, in order to purge themselves of this contempt, the Railroad Company and these officers should completely "disestablish the Association of Clerical Employees," as it was then constituted as the recognized representative of the clerical employees of the Railroad Company, and should reinstate the Brotherhood as such representative, until such time as these employees by a secret ballot taken in accordance with the further direction of the Court, and without the dictation or interference of the Railroad Company and its officers, should choose other representatives. The order also required the restoration to service and to stated privileges of certain employees who had been discharged by the Railroad Company. 24 F. (2d) 426. Punishment was prescribed in case the defendants did not purge themselves of contempt as directed.

On final hearing, the temporary injunction was made permanent. 25 F. (2d) 873. At the same time, a motion to vacate the order in the contempt proceedings was denied. 25 F. (2d) 876. The Circuit Court of Appeals affirmed the decree, holding that the injunction was properly granted and that, in imposing conditions for the purging of the defendants of contempt, the District Court had not gone beyond the appropriate exercise of its authority in providing for the restoration of the *status quo*. 33 F. (2d) 13. This Court granted a writ of certiorari. 280 U. S. 550.

The bill of complaint invoked subdivision third of section 2 of the Railway Labor Act of 1926 (c. 347, 44 Stat. 577), which provides as follows:

"Third. Representatives, for the purposes of this Act, shall be designated by the respective parties in such man-

ner as may be provided in their corporate organization or unincorporated association, or by other means of collective action, without interference, influence, or coercion exercised by either party over the self-organization or designation of representatives by the other."

The controversy is with respect to the construction, validity and application of this statutory provision. The petitioners, the Railroad Company and its officers, contend that the provision confers merely an abstract right which was not intended to be enforced by legal proceedings; that, in so far as the statute undertakes to prevent either party from influencing the other in the selection of representatives, it is unconstitutional because it seeks to take away an inherent and inalienable right in violation of the First and Fifth Amendments of the Federal Constitution; that the granting of the injunction was prohibited by Section 20 of the Clayton Act (U. S. C., Tit. 29, sec. 52); that in any event the action taken by the Railroad Company and its officers in the recognition of the Association of Clerical Employees, and in other proceedings following upon that recognition, was not contrary to law and that there was no warrant for the interposition of the court either in granting the injunction order or in the proceedings for punishment for the alleged contempt.

On the questions of fact, both courts below decided against the petitioners. Under the well-established rule, this Court accepts the findings in which two courts concur, unless clear error is shown. *Stuart* v. *Hayden,* 169 U. S. 1, 14; *Texas & Pacific Railway Company* v. *Railroad Commission,* 232 U. S. 338; *Washington Securities Company* v. *United States,* 234 U. S. 76, 78; *Bodkin* v. *Edwards,* 255 U. S. 221, 223. We cannot say that there was such error in this case. Both the District Court and the Circuit Court of Appeals approached the consideration of the evidence as to intimidation and coercion, and re-

solved such conflicts as the evidence presented, in the light of the demonstration that a strong motive existed on the part of the Railroad Company to oppose the demands of the Brotherhood and to promote another organization of the clerical employees which would be more favorable to the interests and contentions of the Company. Both courts found the explanation of the Company's attitude in the letter addressed by H. M. Lull, executive vice-president of the Railroad Company, to A. D. McDonald, its president, under date of May 24, 1927, shortly before the activities of which complaint was made in this suit. In this letter Mr. Lull referred to the pendency before the United States Board of Mediation of the demand of the Brotherhood for an increase of wages for the clerical employees, and it was stated that if the matter went to arbitration, and the award was made on the same basis as one which had recently been made with respect to the lines west of El Paso, it would mean an increased pay-roll cost of approximately $340,000 per annum. Mr. Lull said that from the best information obtainable the majority of the clerical and station service employees of the Railroad Company did not belong to the national organization (the Brotherhood), and that "it is our intention, when handling the matter in mediation proceedings, to raise the question of the right of this organization to represent these employees and if arbitration is proposed we shall decline to arbitrate on the basis that the petitioner does not represent the majority of the employees. This will permit us to get away from the interference of this organization, and if successful in this, I am satisfied we can make settlement with our own employees at a cost not to exceed $75,000 per annum."

Motive is a persuasive interpreter of equivocal conduct, and the petitioners are not entitled to complain because their activities were viewed in the light of manifest interest and purpose. The most that can be said in favor

of the petitioners on the questions of fact is that the evidence permits conflicting inferences, and this is not enough. The circumstances of the soliciting of authorizations and memberships on behalf of the Association, the fact that employees of the Railroad Company who were active in promoting the development of the Association were permitted to devote their time to that enterprise without deduction from their pay, the charge to the Railroad Company of expenses incurred in recruiting members of the Association, the reports made to the Railroad Company of the progress of these efforts, and the discharge from the service of the Railroad Company of leading representatives of the Brotherhood and the cancellation of their passes, gave support, despite the attempted justification of these proceedings, to the conclusion of the courts below that the Railroad Company and its officers were actually engaged in promoting the organization of the Association in the interest of the Company and in opposition to the Brotherhood, and that these activities constituted an actual interference with the liberty of the clerical employees in the selection of their representatives. In this view, we decline to subject to minute scrutiny the language employed by these courts in discussing questions of fact (*Page* v. *Rogers,* 211 U. S. 575, 577) and we pass to the important questions of law whether the statute imposed a legal duty upon the Railroad Company, that is, an obligation enforceable by judicial proceedings.

It is unnecessary to review the history of the legislation enacted by Congress in relation to the settlement of railway labor disputes, as earlier efforts culminated in Title III of the Transportation Act, 1920 (c. 91, 41 Stat. 456, 469) the purpose and effect of which have been determined by this Court. In *Pennsylvania Railroad Company* v. *United States Railroad Labor Board,* 261 U. S. 72, the question was whether the members of the Railroad

Labor Board as constituted under the provisions of the Transportation Act, 1920, had exceeded their powers. The Court held that the Board had jurisdiction to hear and decide a dispute over rules and working conditions upon the application of either side, when the parties had failed to agree and an adjustment board had not been organized. The Board also had jurisdiction to decide who might represent the employees in the conferences contemplated by the statute and to make reasonable rules for ascertaining the will of the employees in this respect. Interference by injunction with the exercise of the discretion of the Board in the matters committed to it, and with the publication of its opinions, was decided to be unwarranted. The Court thought it evident that Congress considered it to be "of the highest public interest to prevent the interruption of interstate commerce by labor disputes and strikes," and that its plan was " to encourage settlement without strikes, first by conference between the parties; failing that, by reference to adjustment boards of the parties' own choosing," and, if this proved to be ineffective, " by a full hearing before a National Board" organized as the statute provided. But the Court added: " The decisions of the Labor Board are not to be enforced by process. The only sanction of its decision is to be the force of public opinion invoked by the fairness of a full hearing, the intrinsic justice of the conclusion, strengthened by the official prestige of the Board, and the full publication of the violation of such decision by any party to the proceeding." It was said to be the evident thought of Congress " that the economic interest of every member of the Public in the undisturbed flow of interstate commerce and the acute inconvenience to which all must be subjected by an interruption caused by a serious and widespread labor dispute, fastens public attention closely on all the circumstances of the controversy and arouses public criticism of the side thought to be at

fault." *Id.* pp. 79, 80. The Court concluded that the Labor Board was "to act as a Board of Arbitration," but that there was "no constraint" upon the parties "to do what the Board decides they should do except the moral constraint of publication of its decision." *Id.* p. 84.

The provisions of Title III of the Transportation Act, 1920, were again before the Court in *Pennsylvania Railroad System and Allied Lines Federation No. 90* v. *Pennsylvania Railroad Company*, 267 U. S. 203. This was a suit by a union to enjoin the Railroad Company from carrying out an alleged conspiracy to defeat the provisions of the legislation establishing the Railroad Labor Board. The complainants, the Court said, sought "to enforce by mandatory injunction a compliance with a decision of the Board"; and the Court held that "such a remedy by injunction in a court, it was not the intention of Congress to provide." *Id.* p. 216. The Court pointed out that "the ultimate decision of the Board, it is conceded, is not compulsory, and no process is furnished to enforce it." It was in the light of these conclusions as to the purport of the statute that the Court considered the freedom of action of the Railroad Company. The Court said that the Company was using "every endeavor to avoid compliance with the judgment and principles of the Labor Board as to the proper method of securing representatives of the whole body of its employees," that it was "seeking to control its employees by agreements free from the influence of an independent trade union," and, so far as concerned its dealing with its employees, was "refusing to comply with the decisions of the Labor Board." But the Court held that this conduct was within the strict legal rights of the Railroad Company and that Congress had not intended to make such conduct legally actionable. *Id.* p. 217.

It was with clear appreciation of the infirmity of the existing legislation, and in the endeavor to establish a

more practicable plan in order to accomplish the desired result, that Congress enacted the Railway Labor Act of 1926. It was decided to make a fresh start. The situation was thus described in the report of the bill to the Senate by the Committee on Interstate Commerce (69th Cong., 1st sess., Sen. Rep. No. 222): "In view of the fact that the employees absolutely refuse to appear before the labor board and that many of the important railroads are themselves opposed to it, that it has been held by the Supreme Court to have no power to enforce its judgments, that its authority is not recognized or respected by the employees and by a number of important railroads, that the President has suggested that it would be wise to seek a substitute for it, and that the party platforms of both the Republican and Democratic Parties in 1924 clearly indicated dissatisfaction with the provisions of the transportation act relating to labor, the committee concluded that the time had arrived when the labor board should be abolished and the provisions relating to labor in the transportation act, 1920, should be repealed."

The bill was introduced as the result of prolonged conferences between representative committees of railroad presidents and of executives of railroad labor organizations, and embodied an agreement of a large majority of both.[2] The provisions of Title III of the Transportation Act, 1920, and also the Act of July 15, 1913 (c. 6, 38 Stat.

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[2] In the report of the bill by the Committee on Interstate and Foreign Commerce to the House of Representatives, it was said (69th Cong. 1st sess., H. R. Rep. No. 328):

"The bill was introduced as the product of negotiations and conferences between a representative committee of railroad presidents and a representative committee of railroad labor organization executives, extending over several months, which were concluded with the approval of the bill, respectively, by the Association of Railway Executives and by the executives of 20 railroad labor organizations. As introduced, it represented the agreement of railway managements operating over 80 per cent of the railroad mileage

103) which provided for mediation, conciliation and arbitration in controversies with railway employees, were repealed.

While adhering in the new statute to the policy of providing for the amicable adjustment of labor disputes, and for voluntary submissions to arbitration as opposed to a system of compulsory arbitration, Congress buttressed this policy by creating certain definite legal obligations. The outstanding feature of the Act of 1926 is the provision for an enforceable award in arbitration proceedings. The arbitration is voluntary, but the award pursuant to the arbitration is conclusive upon the parties as to the merits and facts of the controversy submitted. (Section 9.) The award is to be filed in the clerk's office of the District Court of the United States designated in the agreement to arbitrate, and unless a petition to impeach the award is filed within ten days, the court is to enter judgment on the award, and this judgment is final and conclusive. Petition for the impeachment of the award may be made upon the grounds that the award does not conform to the substantive requirements of the Act or to the stipulation of the parties, or that the proceedings were not in accordance with the Act or were tainted with fraud or corruption. But the court is not to entertain such a petition on the ground that the award is invalid for uncer-

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and labor organizations representing an overwhelming majority of the railroad employees."

The committee of the Senate on Interstate Commerce reported to the Senate on this point, as follows (69th Cong., 1st sess., Sen. Rep. No. 222):

"The railroads favoring the bill appeared before the committee through their representatives and advocated it. None of the railroads opposing the bill appeared either in person or by any representative. The bill was agreed to also by all the organizations known as 'standard recognized railway labor organizations,' 20 in number, and these appeared by their representatives before the committee in advocacy of the bill."

tainty, and in such case the remedy is to be found in a submission of the award to a reconvened board or to a sub-committee thereof for interpretation, as provided in the Act. Thus it is contemplated that the proceedings for the amicable adjustment of disputes will have an appropriate termination in a binding adjudication, enforceable as such.

Another definite object of the Act of 1926 is to provide, in case of a dispute between a carrier and its employees which has not been adjusted under the provisions of the Act, for the more effectual protection of interstate commerce from interruption to such a degree as to deprive any section of the country of essential transportation service. (Section 10.) In case the Board of Mediation established by the Act, as an independent agency in the executive branch of the Government, finds that such an interruption of interstate commerce is threatened, that Board is to notify the President, who may thereupon in his discretion create an emergency board of investigation to report, within thirty days, with respect to the dispute. The Act then provides that "After the creation of such board and for thirty days after such board has made its report to the President, no change, except by agreement, shall be made by the parties to the controversy in the conditions out of which the dispute arose." (*Id.*) This prohibition, in order to safeguard the vital interests of the country while an investigation is in progress, manifestly imports a legal obligation. The Brotherhood insists, and we think rightly, that the major purpose of Congress in passing the Railway Labor Act was "to provide a machinery to prevent strikes." Section 10 is described by counsel for the Brotherhood as "a provision limiting the right to strike," and in this view it is insisted that there "is no possible question that Congress intended to make the provisions of Section 10 enforceable to the extent of authorizing any court of competent jurisdiction to restrain

either party to the controversy from changing the existing status during the sixty-day period provided for the emergency board." [3]

The provision of Section 10 is to be read in connection with the qualification in subdivision eighth of Section 9 that nothing in the Act shall be construed to require an individual employee to render labor without his consent or as making the quitting of service by an individual employee an illegal act, and that no court shall issue any process to compel the performance by an individual employee of labor without his consent. The purpose of this

[3] In the report to the House of Representatives by its Committee on Interstate and Foreign Commerce, it was stated as to this provision (69th Cong., 1st sess., H. R. Rep. No. 328):

"This temporary emergency board will be able to express and to mobilize public opinion to an extent impossible to any permanent board or any agency of Government which has been heretofore created for that purpose. It is also highly important to point out that during the period of investigation and for 30 days thereafter the parties to the controversy are bound under the proposed law to maintain unchanged the conditions out of which the dispute arose, thereby assuring the parties and the public that the emergency board will have the full and unembarrassed opportunity to exert its authority and fulfil its important function."

The Committee on Interstate Commerce of the Senate stated in its report, with respect to a proposed amendment of section 10 forbidding strikes *eo nomine*, as follows (69th Cong., 1st sess., Sen. Rep. No. 222):

"The objection that the bill should in express terms forbid strikes during the period of the inquiry by the emergency board and for 30 days thereafter is successfully met, in the opinion of the committee, by the contention that in forbidding a change in the conditions out of which a dispute arose, one of which and a very fundamental one is the relationship of the parties, it already forbids any interruption of commerce during the period referred to; and if strikes were in express terms forbidden for a given period there might be an implication that after that period strikes to interfere with the passage of the United States mails and with continuous transportation service might be made legal. In the opinion of the committee, this possible implication should be avoided."

limitation was manifestly to protect the individual liberty of employees and not to affect proceedings in case of combinations or group action. The denial of legal process in the one case is significant with respect to its expected, appropriate use in the other.[4]

It is thus apparent that Congress, in the legislation of 1926, while elaborating a plan for amicable adjustments and voluntary arbitration of disputes between common carriers and their employees, thought it necessary to impose, and did impose, certain definite obligations enforceable by judicial proceedings. The question before us is whether a legal obligation of this sort is also to be found in the provisions of subdivision third of Section 2 of the Act providing that "Representatives for the purposes of this Act, shall be designated by the respective parties . . . without interference, influence, or coercion exercised by either party over the self-organization or designation of representatives by the other."

It is at once to be observed that Congress was not content with the general declaration of the duty of carriers and employees to make every reasonable effort to enter into and maintain agreements concerning rates of pay,

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[4] In relation to this paragraph, the Senate Committee stated in its report (69th Cong., 1st sess., Sen. Rep. No. 222):

"As to paragraph (8) of section 9, it was urged that it should be clarified so as certainly to apply only to the use of legal process against an individual employee and so as not to apply to combinations or conspiracies between several employees, or groups of employees, to interrupt interstate commerce. It was frankly stated by the advocates of the bill, both those representing the carriers and those representing the employees, that the purpose of the paragraph was to deal merely with individual employees, to express only the constitutional right of individuals against involuntary servitude, and was not intended to deal with combinations, conspiracies, or group action. This construction has been made abundantly clear by an amendment to the bill by which the word 'individual' has been inserted before the word 'employee' wherever the latter word appears in the paragraph."

rules and working conditions, and to settle disputes with all expedition in conference between authorized representatives, but added this distinct prohibition against coercive measures. This addition can not be treated as superfluous or insignificant, or as intended to be without effect. *Ex parte Public National Bank,* 278 U. S. 101, 104. While an affirmative declaration of duty contained in a legislative enactment may be of imperfect obligation because not enforceable in terms, a definite statutory prohibition of conduct which would thwart the declared purpose of the legislation cannot be disregarded. The intent of Congress is clear with respect to the sort of conduct that is prohibited. "Interference" with freedom of action and "coercion" refer to well understood concepts of the law. The meaning of the word "influence" in this clause may be gathered from the context. *Noscitur a sociis. Virginia* v. *Tennessee,* 148 U. S. 503, 519. The use of the word is not to be taken as interdicting the normal relations and innocent communications which are a part of all friendly intercourse, albeit between employer and employee. "Influence" in this context plainly means pressure, the use of the authority or power of either party to induce action by the other in derogation of what the statute calls "self-organization." The phrase covers the abuse of relation or opportunity so as to corrupt or override the will, and it is no more difficult to appraise conduct of this sort in connection with the selection of representatives for the purposes of this Act than in relation to well-known applications of the law with respect to fraud, duress and undue influence. If Congress intended that the prohibition, as thus construed, should be enforced, the courts would encounter no difficulty in fulfilling its purpose, as the present suit demonstrates.

In reaching a conclusion as to the intent of Congress, the importance of the prohibition in its relation to the plan devised by the Act must have appropriate considera-

tion. Freedom of choice in the selection of representatives on each side of the dispute is the essential foundation of the statutory scheme. All the proceedings looking to amicable adjustments and to agreements for arbitration of disputes, the entire policy of the Act, must depend for success on the uncoerced action of each party through its own representatives to the end that agreements satisfactory to both may be reached and the peace essential to the uninterrupted service of the instrumentalities of interstate commerce may be maintained. There is no impairment of the voluntary character of arrangements for the adjustment of disputes in the imposition of a legal obligation not to interfere with the free choice of those who are to make such adjustments. On the contrary, it is of the essence of a voluntary scheme, if it is to accomplish its purpose, that this liberty should be safeguarded. The definite prohibition which Congress inserted in the Act can not therefore be overridden in the view that Congress intended it to be ignored. As the prohibition was appropriate to the aim of Congress, and is capable of enforcement, the conclusion must be that enforcement was contemplated.

The absence of penalty is not controlling. The creation of a legal right by language suitable to that end does not require for its effectiveness the imposition of statutory penalties. Many rights are enforced for which no statutory penalties are provided. In the case of the statute in question, there is an absence of penalty, in the sense of specially prescribed punishment, with respect to the arbitral awards and the prohibition of change in conditions pending the investigation and report of an emergency board, but in each instance a legal obligation is created and the statutory requirements are susceptible of enforcement by proceedings appropriate to each. The same is true of the prohibition of interference or coercion in connection with the choice of representatives. The

right is created and the remedy exists. *Marbury* v. *Madison,* 1 Cranch 137, 162, 163.

We entertain no doubt of the constitutional authority of Congress to enact the prohibition. The power to regulate commerce is the power to enact "all appropriate legislation" for its "protection and advancement" (*The Daniel Ball,* 10 Wall. 557, 564); to adopt measures "to promote its growth and insure its safety" (*County of Mobile* v. *Kimball,* 102 U. S. 691, 696, 697); to "foster, protect, control and restrain" (*Second Employers' Liability Cases,* 223 U. S. 1, 47). Exercising this authority, Congress may facilitate the amicable settlement of disputes which threaten the service of the necessary agencies of interstate transportation. In shaping its legislation to this end, Congress was entitled to take cognizance of actual conditions and to address itself to practicable measures. The legality of collective action on the part of employees in order to safeguard their proper interests is not to be disputed. It has long been recognized that employees are entitled to organize for the purpose of securing the redress of grievances and to promote agreements with employers relating to rates of pay and conditions of work. *American Steel Foundries* v. *Tri-City Central Trades Council,* 257 U. S. 184, 209. Congress was not required to ignore this right of the employees but could safeguard it and seek to make their appropriate collective action an instrument of peace rather than of strife. Such collective action would be a mockery if representation were made futile by interferences with freedom of choice. Thus the prohibition by Congress of interference with the selection of representatives for the purpose of negotiation and conference between employers and employees, instead of being an invasion of the constitutional right of either, was based on the recognition of the rights of both. The petitioners invoke the principle declared in *Adair* v. *United States,* 208 U. S. 161, and *Coppage* v. *Kansas,* 236 U. S. 1,

but these decisions are inapplicable. The Railway Labor Act of 1926 does not interfere with the normal exercise of the right of the carrier to select its employees or to discharge them. The statute is not aimed at this right of the employers but at the interference with the right of employees to have representatives of their own choosing. As the carriers subject to the Act have no constitutional right to interfere with the freedom of the employees in making their selections, they cannot complain of the statute on constitutional grounds.

A subordinate point is raised by the petitioner under Section 20 of the Clayton Act. This section provides, in substance, that no injunction shall be granted in any case growing out of a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property or to a property right. This provision has been said to be declaratory of the existing law. *Duplex Printing Press Company* v. *Deering,* 254 U. S. 443, 470. It may be doubted whether Section 20 can be regarded as limiting the authority of the court to restrain the violation of an explicit provision of an act of Congress, where an injunction would otherwise be the proper remedy. It is not necessary to pass upon this point, for if it could be said that it was necessary in the present instance to show a property interest in the employees in order to justify the court in granting an injunction, we are of the opinion that there was such an interest, with respect to the selection of representatives to confer with the employer in relation to contracts of service, as satisfied the statutory requirement. See *Coppage* v. *Kansas, supra,* pp. 14, 15.

We do not find that the decree below goes beyond the proper enforcement of the provision of the Railway Labor Act.

Decree affirmed.

Mr. Justice McReynolds did not hear the argument and took no part in the decision of this case.

WHEELER LUMBER BRIDGE AND SUPPLY COMPANY OF DES MOINES, IOWA, *v.* UNITED STATES.

CERTIFICATE FROM THE COURT OF CLAIMS.

No. 15. Argued April 25, 1929.—Decided May 26, 1930.

1. A certification by the Court of Claims under § 3 (a) of the Act of February 13, 1925, can not be entertained if the question certified embraces the whole case, because to accept it and proceed to a determination thereof would be an exercise of original jurisdiction by this Court contrary to the Constitution, and because the statute permits a certification only of definite and distinct questions of law. P. 576.
2. That a certification from a court of first instance, restricted to definite and distinct questions of law, invokes appellate action, is settled by early and long continued usage amounting to a practical construction of the constitutional provision defining the jurisdiction of this Court. *Id.*
3. The certification of a definite question of law is not rendered objectionable merely because the answer may be decisive of the case. P. 577.
4. The importance or controlling character of the question certified, if it be a question of law and suitably specific, affords no ground for declining to accept the certification. *Id.*
5. Under the Revenue Acts of 1917 and 1918, which imposed a tax on transportation of freight payable by the person paying for the service, the exemption [§ 502, Act of 1917; § 500 (h), Act of 1918,] allowed in case of transportation rendered to a State is to be construed as extending to her counties. P. 578.
6. Where a vendor, who had engaged to sell and deliver lumber needed for public bridges to a county at a designated point in the county f. o. b. at a stated price, shipped the lumber by rail to that point preparatory to there effecting the required delivery and forwarded the bills of lading to the county, and the latter, conformably to the vendor's intention, surrendered the bills of lading to the carrier, paid its transportation charges, received the lumber from it, deducted from the f. o. b. price at destination the transportation charges paid to the carrier, and remitted the balance to the vendor—the transportation of the lumber to the place of delivery was not a service rendered to the county (State) within the meaning of the exempting provisions of § 502 of the

Revenue Act of 1917 and § 500 (h) of the Revenue Act of 1918. P. 575.

7. Although the transportation in this case was with a view to a definite sale to the county, the transportation was not in fact a part of the sale, but preliminary to it and wholly the vendor's affair; therefore the tax on the transportation can not be regarded as a tax or burden on the sale, and *Panhandle Oil Co.* v. *Mississippi*, 277 U. S. 218, is inapplicable. P. 579.

ANSWER to a question certified by the Court of Claims in a suit by the Lumber Company to recover the amount of a tax on rail transportation service, which it paid under protest.

Mr. Jesse I. Miller for the Wheeler Lumber Bridge & Supply Company.

Attorney General Mitchell, Assistant Attorney General Galloway, Messrs. Alfred A. Wheat and *Gardner P. Lloyd,* Special Assistants to the Attorney General, and *Joseph H. Sheppard* were on the brief for the United States.

MR. JUSTICE VAN DEVANTER delivered the opinion of the Court.

The Court of Claims has certified to us a question concerning which it desires instruction for the proper disposition of the above entitled cause now pending before it. Late in the last term we dismissed the certificate in the belief that the question propounded embraces the whole case, and so could not be answered consistently with the applicable statute or with the constitutional limitations on our jurisdiction. But before the term closed we vacated the order of dismissal and held the matter for further consideration.

The facts shown in the certificate are as follows: In the years 1918, 1919, 1920 and 1921, the plaintiff, a corporate dealer in bridge materials, engaged to sell and

deliver to each of several counties in the States of Iowa and Nebraska a quantity of lumber, which in each instance was needed and used by the purchasing county in the construction or repair of bridges along public highways within the county. The plaintiff was to ship the lumber from places outside the State to designated points within the purchasing county and there deliver the same to the county f. o. b. at stated prices. The plaintiff fulfilled its engagement as made. The shipping was done by railroad under bills of lading calling for delivery by the carrier to the plaintiff, or on its order, at destination. The plaintiff forwarded the bills of lading to the county clerk; and when the shipments reached their destination the county clerk, acting for the county and conforming to the plaintiff's intention, presented the bills of lading to the carrier, paid the transportation charges, accepted the lumber, deducted the transportation charges from the stipulated f. o. b. price and remitted the balance to the plaintiff.

The federal revenue laws in force at the time imposed on the transportation of freight by rail or water a tax of three per cent of the amount paid for that service; required that the tax be paid "by the person paying for the service"; and authorized the carrier to collect the tax on behalf of the government; but declared that transportation service rendered to a State should be exempt from the tax. Revenue Act 1917, c. 63, §§ 500, 501, 502, 503, 40 Stat. 300, 314, 315; Revenue Act 1918, c. 18, §§ 500 (a) and (h), 501 (a), 502, 40 Stat. 1057, 1101, 1102, 1103. In the administrative regulations issued under those laws the exemption of transportation service to a State was construed as including such service to her "political subdivisions, such as counties, cities, towns, and other municipalities."

No tax on the transportation service was demanded or paid when the transportation charges were paid. But

thereafter the Collector of Internal Revenue assessed such a tax against the plaintiff and the plaintiff paid it under protest. Application was then made by the plaintiff to have the amount refunded; but the application was denied by the Commissioner of Internal Revenue.

The suit in the Court of Claims was brought by the plaintiff against the United States to recover the amount collected on the tax—that exaction being assailed on two grounds: One that the transportation service was rendered to the purchasing counties, and therefore was exempt from the tax, and the other that, as the counties paid the carrier its transportation charges, the liability, if any, for the tax did not attach to the plaintiff.

The certificate further shows that the court referred the case to a commissioner who, in accord with the reference, reported special findings of fact; and that both parties conceded the correctness and accuracy of the report. In making the certificate the court accepted and summarized the facts reported by its commissioner.

The question certified, somewhat shortened in words but not altered in substance, is—

Where a vendor, who has engaged to sell and deliver lumber needed for public bridges to a county at a designated point in the county f. o. b. at a stated price, ships the lumber by rail to that point preparatory to there effecting the required delivery and forwards the bills of lading to the county, and the latter, conformably to the vendor's intention, surrenders the bills of lading to the carrier, pays its transportation charges, receives the lumber from it, deducts from the f. o. b. price at destination the transportation charges paid to the carrier, and remits the balance to the vendor—is the transportation of the lumber to the place of delivery a service rendered to the county [State] within the meaning of the exempting provisions of § 502 of the Revenue Act of 1917 and § 500(h) of the Revenue Act of 1918, and within the principle

recognized and applied in *Panhandle Oil Co.* v. *Mississippi*, 277 U. S. 218?

The statute providing for certification of questions by the Court of Claims is § 3 (a) of the act of February 13, 1925, c. 229, 43 Stat. 936, 939, which reads:

"That in any case in the Court of Claims, including those begun under section 180 of the Judicial Code, that court at any time may certify to the Supreme Court any definite and distinct questions of law concerning which instructions are desired for the proper disposition of the cause; and thereupon the Supreme Court may give appropriate instructions on the questions certified and transmit the same to the Court of Claims for its guidance in the further progress of the cause."

This is a new provision. Similar provisions have permitted particular federal courts to certify questions to this Court, but this provision is the first giving such authority to the Court of Claims.

There are two reasons why a certification by that court which embraces the whole case cannot be entertained by this Court. One is that to accept such a certification and proceed to a determination thereon, in advance of a decision by that court, would be an exercise of original jurisdiction by this Court contrary to the constitutional provision which prescribes that its jurisdiction shall be appellate in all cases other than those affecting ambassadors, other public ministers and consuls, and those in which a State shall be a party. Art. III, § 2, cl. 2. The other is that the statute permits a certification only of "definite and distinct questions of law."

Even the restricted certification permitted by the statute invokes action which is rather exceptional in the appellate field. But that such action is appellate is now settled. Early and long continued usage amounting to a practical construction of the constitutional provision requires that it be so regarded.

In § 6 of the act of April 29, 1802, c. 31, 2 Stat. 156, Congress made provision for restricted certifications from the circuit courts to this Court in advance of a decision by the former. That provision remained in force and was given effect for seventy years. Many certifications in both civil and criminal cases were entertained and dealt with under it. Indeed, it was the only mode in which questions of law in cases of several classes could be brought to this Court during that period.

But in exercising that jurisdiction this Court uniformly ruled that it could not entertain the certifications unless they were of distinct questions of law and not of the whole case, for otherwise it would be assuming original jurisdiction withheld from it by the Constitution. *White* v. *Turk,* 12 Pet. 238, 239; *United States* v. *Stone,* 14 Pet. 524, 525; *Nesmith* v. *Sheldon,* 6 How. 41, 43; *Webster* v. *Cooper,* 10 How. 54, 55; *The Alicia,* 7 Wall. 571, 573; *United States* v. *Perrin,* 131 U. S. 55, 58; *Baltimore and Ohio R. R. Co.* v. *Interstate Commerce Commission,* 215 U. S. 216, 224.

And, in applying the provision of 1802 and other later provisions permitting certifications, this Court, while holding, on the one hand, that it cannot be required through certifications thereunder to pass upon questions of fact, or mixed questions of law and fact; or to accept a transfer of the whole case; or to answer questions of objectionable generality—which instead of presenting distinct propositions of law cover unstated matters lurking in the record—or questions that are hypothetical and speculative, has distinctly held, on the other hand, that the certification of a definite question of law is not rendered objectionable merely because the answer may be decisive of the case, and also that the importance or controlling character of the question certified, if it be a question of law and suitably specific, affords no ground for declining

to accept the certification. *United States* v. *Mayer,* 235 U. S. 55, 66, and cases cited.

The practice and rulings just described are equally applicable to certifications under the provision relating to the Court of Claims.

Upon further consideration of the present certificate in the light of that practice and those rulings we are of opinion that the certificate is not open to any valid objection and should be entertained. The question certified is a distinct and definite question of law and its materiality is adequately shown. Neither in form nor in effect does it embrace the whole case. It does not include any question of fact, but, on the contrary, treats the facts as fully ascertained and definitely states those out of which it arises. No doubt, with these facts ascertained, an affirmative answer to the question would be decisive of the case. But if the answer were in the negative the case would be left where another question of law raised by the plaintiff's petition and mooted in the Court of Claims, but not certified, would need to be resolved by that court before a judgment could be given.

We thus are brought to the solution of the certified question. Counsel for the government concede, and rightly so, that the exemption accorded to a State by § 502 of the Revenue Act of 1917 and § 500(h) of the Revenue Act of 1918 should be construed as extending to her counties, as is done in the administrative regulations. The Court of Claims, evidently entertaining this view of the exemption, inquires whether the transportation described in the question is a service rendered to the county within the meaning of those sections. The transportation is had at the vendor's instance and is his means of getting his lumber to the place of sale and delivery. He engages to deliver f. o. b., not at the place of shipment, but at the place of destination, which is

the place of sale and delivery. There is no delivery, and therefore no sale, until after the transportation is completed. Upon these facts, recited in the question, we are of opinion that the transportation is not a service rendered to the county in the sense of the sections cited, but is a service rendered to the vendor. Conceding that the sections are parts of a taxing scheme, and assuming that they are intended to recognize and fully respect the constitutional immunity of a state agency, such as a county, from federal taxation, we think they neither require such transportation to be regarded as a service to the county nor operate to exempt such transportation from the tax.

The tax is not laid on the sale nor because of the sale. It is laid on the transportation and is measured by the transportation charges. True, it appears that here the transportation was had with a view to a definite sale; but the fact remains that the transportation was not part of the sale but preliminary to it and wholly the vendor's affair. *United States* v. *Normile,* 239 U. S. 344, 348. It follows that the tax on the transportation cannot be regarded as a tax or burden on the sale. *Cornell* v. *Coyne,* 192 U. S. 418.

As the tax is not laid on the sale or in any wise measured by it the case of *Panhandle Oil Co.* v. *Mississippi,* 277 U. S. 218, referred to in the question and relied on by the plaintiff, is not in point.

Question Answered "No."

UNIVERSAL BATTERY COMPANY *v.* UNITED STATES.

VESTA BATTERY CORPORATION *v.* SAME.

BASSICK MANUFACTURING COMPANY *v.* SAME.

F. W. STEWART MANUFACTURING CORPORATION *v.* SAME.

GEMCO MANUFACTURING COMPANY *v.* SAME.

CERTIORARI TO THE COURT OF CLAIMS.

Nos. 127, 275, 350, 351, and 352. Argued January 21, 1930.—Decided May 26, 1930.

1. The construction of the terms "parts" and "accessories" adopted in administrative regulations issued under § 900 of the Revenue Acts of 1918 and 1921 (which imposed a manufacturers' excise tax upon the sale of automobile parts and accessories), whereby articles primarily adapted for use in motor vehicles are to be regarded as parts or accessories of such vehicles, even though there has been some other use of the articles for which they are not so well adapted, is reasonable, and, having been adhered to in the Internal Revenue Bureau for about ten years, should be upheld. P. 583.
2. Applying that construction to sales of specific articles, it is *held* that storage batteries, of a type specially suitable for use on automobiles as replacements, and not adapted to any other primary purpose or use, and replacement parts for speedometers and bumpers, were properly regarded as parts or accessories; while storage batteries, of a type alleged to be not primarily adapted for use on automobiles, and gascolaters, a device alleged to be sold for general use on various types of internal combustion engines as well as automobiles, could not properly be regarded as parts or accessories unless there are affirmative finding on the issue of primary adaptation. P. 584.

66 Ct. Cls. 748; 68 *id.* 366, reversed.
67 Ct. Cls. 275; *id.* 287; *id.* 711, affirmed.

CERTIORARI, 280 U. S. 539, 546, 547, to review judgments of the Court of Claims sustaining excise taxes under § 900

of the Revenue Acts of 1918 and 1921, upon the sales of articles classed as "parts or accessories" for motor vehicles.

Mr. George M. Morris for the Universal Battery Company and the Vesta Battery Corporation.

Mr. George M. Wilmeth for the Bassick Manufacturing Company, the F. W. Stewart Manufacturing Corporation, and the Gemco Manufacturing Company.

Mr. Claude R. Branch, with whom *Assistant Attorney General Youngquist, Messrs. Sewall Key* and *Andrew D. Sharpe,* Special Assistants to the Attorney General, and *Ralph C. Williamson* were on the brief, for the United States.

Mr. Justice Van Devanter delivered the opinion of the Court.

These are cases brought against the United States to recover taxes paid under § 900 of the Revenue Acts of 1918 and 1921, c. 18, 40 Stat. 1122; c. 136, 42 Stat. 291, upon sales of articles which the revenue officers regarded as "parts or accessories for" motor vehicles the sale of which is subjected to a tax by subdivisions 1 and 2 of that section. In each case the facts were found specially and judgment was given for the defendant. In all this Court granted certiorari.

We pass the details relating to protests, claim to a refund and administrative denial of those claims, and come directly to the terms of the section under which the taxes were exacted. It provides:

"Sec. 900. That there shall be levied, assessed, collected and paid upon the following articles sold or leased by the manufacturer, producer, or importer, a tax equivalent to the following percentages of the price for which so sold or leased—

"(1) Automobile trucks and automobile wagons, (including tires, inner tubes, parts, and accessories therefor, sold on or in connection therewith or with the sale thereof), 3 per centum;

"(2) Other automobiles and motorcycles, (including tires, inner tubes, parts, and accessories therefor, sold on or in connection therewith or with the sale thereof), except tractors, 5 per centum;

"(3) Tires, inner tubes, parts, or accessories, for any of the articles enumerated in subdivision (1) or (2), sold to any person other than a manufacturer or producer of any of the articles enumerated in subdivision (1) or (2), 5 per centum; " . . .

The claimants do not manufacture or sell any of the vehicles enumerated in subdivisions 1 and 2, but each does manufacture and sell the article on sales of which the challenged tax was assessed and collected. These sales were all to persons other than a manufacturer or producer of any of the enumerated vehicles. In each case the question presented is whether the article sold is a " part or accessory for " such a vehicle within the meaning of subdivision 3.

Taking the three subdivisions together it is apparent that the words " parts " and " accessories " have the same meaning in all; that they comprehend articles having some relation to the enumerated motor vehicles; and that it is because of that relation that the tax is laid on their sale.

Subdivisions 1 and 2, with the introductory provision, contemplate that parts and accessories may be sold along with the vehicle by the manufacturer of the latter, and show that where this is done the tax is to be paid by the manufacturer of the vehicle. Subdivision 3, with the introductory provision, contemplates that parts and accessories may be sold separately from the vehicle by the

manufacturer of the former to others than a manufacturer of the latter, as where the sale is for replacement purposes, and show that the tax on such a sale is to be paid by the manufacturer of the parts and accessories. And it is implicit in the three subdivisions, with the introductory provision, that where parts and accessories are sold by their manufacturer to a vehicle manufacturer to be resold along with the vehicle by the latter, the sale by the former is to be tax free, while the resale by the latter, when incidental to the sale of the vehicle, is to be taxed against the latter as already indicated.

Thus the scheme of taxation embodied in these provisions centers around the motor vehicles enumerated therein. Their sale is the principal thing that is taxed, and the sale of parts and accessories "for" such vehicles is taxed because the parts and accessories are within the same field with the vehicles and used to the same ends.

The administrative regulations issued under § 900 uniformly have construed the term "part" in that section as meaning any article designed or manufactured for the special purpose of being used as, or to replace, a component part of such vehicle, and which by reason of some characteristic is not such a commercial article as ordinarily would be sold for general use, but is primarily adapted for use as a component part of such vehicle. The regulations also have construed the term "accessory" as meaning any article designed to be used in connection with such vehicle to add to its utility or ornamentation and which is primarily adapted for such use, whether or not essential to the operation of the vehicle.

This construction of those terms has been adhered to in the Internal Revenue Bureau for about ten years and it ought not to be disturbed now unless it be plainly wrong. We think it is not so, but is an admissible construction. Certainly it would be unreasonable to hold

that articles equally adapted to a variety of uses and commonly put to such uses, one of which is use in motor vehicles, must be classified as parts or accessories for such vehicles. And it would be also unreasonable to hold that articles can be so classified only where they are adapted solely for use in motor vehicles and are exclusively so used. *Magone* v. *Wiederer,* 159 U. S. 555, 559. We think the view taken in the administrative regulations is reasonable and should be upheld. It is that articles primarily adapted for use in motor vehicles are to be regarded as parts or accessories of such vehicles, even though there has been some other use of the articles for which they are not so well adapted.

It remains to apply that view to the cases in hand.

In No. 127 the claimant was taxed on the sale of storage batteries to divers dealers. In the petition it was alleged that batteries of the type sold were not primarily adapted for use in motor vehicles, but on the contrary were, and long had been, used for various other purposes particularly named. This was a material issue; but the court, although finding that the batteries were, and had been for several years, used for the purposes alleged, made no finding as to whether they were primarily adapted for use in motor vehicles or were equally adapted for the other uses named. There should have been a definite finding on the matter. The other findings are such that, in view of that omission, the judgment should be reversed and the case remanded for complete findings and such further proceedings as may be appropriate.

In No. 275 the articles sold were storage batteries. There is a special finding that the batteries were of a type specially suitable for use on automobiles as replacements and were not adapted to any other primary purpose or use. With this matter of fact so found the judgment should be affirmed.

In No. 350 the tax was on sales of gascolaters, a device used on internal combustion engines to strain dirt, water and foreign matter from the gasoline before it reaches the carburetor. The petition alleged that gascolaters were not parts or accessories of motor vehicles but commercial articles sold for general use and used on various internal combustion engines other than those in motor vehicles. This was a material issue. The findings make no definite response to it but leave the matter where conflicting inferences may be drawn respecting it. Because of this, the judgment should be reversed and the case remanded for definite and complete findings and such further proceedings as may be appropriate.

In No. 351 the articles sold were gears, flexible shafts and flexible housings, all being replacement parts for speedometers used on motor vehicles. It is conceded that speedometers are accessories; but it is insisted that parts of a speedometer cannot be such. We think they can. The finding is that these parts were specially designed, manufactured and sold for use on automobiles and are not adapted to any other purpose or use. It is not questioned that when sold they had reached such a stage of manufacture that they were adapted for ready replacement and use; so it is not as if the process of manufacture were not complete. A speedometer consists of distinct and separate parts, and we perceive no reason why one or more of these when manufactured and sold for the purpose shown by the finding should not take the same classification as speedometers. The judgment should be affirmed.

In No. 352 the tax was laid on sales of bars, brackets and fittings for use as replacement parts for bumpers on automobiles. They were designed, manufactured and sold for such use and were not adapted for any other. It is said that while bumpers are accessories these parts can-

not be so regarded. We think they are on the same plane as the parts of speedometers just dealt with. The judgment should be affirmed.

In Nos. 127 and 350 judgments reversed and cases remanded for further findings.

In Nos. 275, 351 and 352 judgments affirmed.

BALDWIN ET AL. *v.* MISSOURI.

ERROR TO AND APPEAL FROM THE SUPREME COURT OF MISSOURI.

No. 417. Argued April 23, 1930.—Decided May 26, 1930.

A resident of Illinois, dying there, willed all her property to her son, also a resident of that State. The will was probated in Illinois and an inheritance tax was there laid upon all her intangible personalty, wherever situate. At the time of her death she owned credits for cash deposited in banks located in Missouri, and coupon bonds of the United States and promissory notes, all physically within that State. Some of the notes had been executed by citizens of Missouri, and some were secured on lands there. *Held* that the credits, bonds and notes were not within the jurisdiction of Missouri for taxation purposes, and that to enforce Missouri transfer or inheritance taxes reckoned upon their value would violate the due process clause of the Fourteenth Amendment. P. 591.

323 Mo. 207, reversed.

APPEAL from a judgment of the Supreme Court of Missouri, which reversed a judgment of the state Circuit Court and sustained an inheritance tax, assessed by the Probate Court, which the Circuit Court, on appeal, had found invalid.

Messrs. John F. Garner and *Harry Carstarphen,* for plaintiffs in error and appellants.

A bank deposit is an ordinary debt. *Blodgett* v. *Silberman,* 277 U. S. 1. Bonds and notes are not things tangible, but are evidences of debt only. *Blodgett* v.

Silberman, supra; State Tax on Foreign Held Bonds, 15 Wall. 300; *Rhode Island Hospital Trust Co.* v. *Doughton,* 270 U. S. 69; *Farmers Loan & Trust Co.* v. *Minnesota,* 280 U. S. 204.

It may no longer be questioned that the situs of intangible personal property is the domicile of the owner of the choses in action or debt. *Frick* v. *Pennsylvania,* 268 U. S. 473; *Rhode Island Trust Co.* v. *Doughton, supra; Farmers Loan & Trust Co.* v. *Minnesota, supra; Safe Deposit & Trust Co.* v. *Virginia,* 280 U. S. 83.

To avoid confiscation of property and yet to give full force and effect to constitutional taxing provisions, only one State should be permitted to tax the devolution of the same property and that State is the State of the legal situs.

Messrs. Stratton Shartel, Attorney General of Missouri, and *A. M. Meyer,* Assistant Attorney General, with whom *Mr. Lieutellus Cunningham,* Assistant Attorney General, was on the brief, for defendant in error and appellee.

This case, so far as it relates to a tax measured by bank deposits, is distinguishable from *Farmers Loan & Trust Co.* v. *Minnesota,* 280 U. S. 204, and it is not necessarily within the principle criticized in that case as having formed the basis of *Blackstone* v. *Miller,* 188 U. S. 189.

To sustain the tax it is not necessary to say that a chose in action necessarily has a situs for taxation purposes at the domicile of the debtor, nor that the Fourteenth Amendment does not prevent the taxation of the same property by different States upon inconsistent principles.

Succession and inheritance taxes may be measured by the value of the United States bonds of a non-resident decedent when found within the jurisdiction of the State levying the tax. *Blackstone* v. *Miller, supra.*

On this phase the case differs from *Farmers Loan & Trust Co.* v. *Minnesota,* in that here the evidences of debt were actually present in Missouri.

Succession and inheritance taxes may be measured by the value of promissory notes secured by mortgages on Missouri real estate and owed by residents of Missouri, where the notes and securities were in Missouri, even though they belonged to the estate of a non-resident decedent. *In re Merriam's Estate,* 147 Mich. 630; *Blackstone* v. *Miller,* 188 U. S. 189.

The unsecured notes probably stand on the same footing as the bank deposits, save that the record does not disclose that any evidence of indebtedness issued by the bank to the decedent was found in Missouri.

Mr. Justice McReynolds delivered the opinion of the Court.

The validity of Sec. 558, R. S. of Missouri, 1919, was duly challenged in the court below; by the judgment there the rights of the parties were finally determined; the cause is properly here on appeal.

While a resident of Quincy, Adams County, Illinois, Carrie Pool Baldwin died, October 4, 1926. By will she left all her property to Thomas A. Baldwin, her son, a resident of the same place, and appointed him sole executor. The will was duly probated at her residence and under the statute of Illinois an inheritance tax was there laid upon the value of all her intangible personalty, wherever situated.

Ancillary letters of administration with the will annexed issued out of the probate court of Lewis County, Missouri, to Harry Carstarphen, October 22, 1926. A report to that court revealed that at the time of her death Mrs. Baldwin owned real estate in Missouri; credits for cash deposited with two or more banks located there; also certain coupon bonds issued by the United

States and sundry promissory notes which were then physically within that State. Most of these notes were executed by citizens of Missouri and the larger part were secured by liens upon lands lying therein.

Under Sec. 558, R. S. 1919,* (copied in margin) the State of Missouri demanded transfer or inheritance taxes reckoned upon the value of all the above described property. No denial of this claim was made in respect of the real estate; but as to the personalty it was resisted upon the ground that the property was not within the jurisdiction of the State for taxation purposes and to enforce the demand would violate the due process clause of the Fourteenth Amendment.

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*Section 558, Revised Statutes of Missouri, 1919, Chapter 1, Article XXI:

"A tax shall be and is hereby imposed upon the transfer of any property, real, personal or mixed or any interest therein or income therefrom, in trust or otherwise, to persons, institutions, associations, or corporation, not hereinafter exempted, in the following cases: When the transfer is by will or by the intestate laws of this state from any person dying possessed of the property while a resident of the state. When the transfer is by will, or intestate law of property within the state or within the jurisdiction of the state and decedent was a non-resident of the state at the time of his death. When the transfer is made by a resident or by a non-resident when such non-resident's property is within this state, or within its jurisdiction, by deed, grant, bargain, sale or gift made in contemplation of the death of grantor, vendor or donor, or intending to take effect in possession or enjoyment at or after such death. Every transfer by deed, grant, bargain, sale or gift made within two years prior to the death of grantor, vendor or donor, of a material part of his estate or in the nature of a final disposition or distribution thereof without an adequate valuable consideration shall be construed to have been made in contemplation of death within the meaning of this section. Such tax shall be imposed when any person, association, institution or corporation actually comes into the possession and enjoyment of the property, interest therein, or income therefrom, whether the transfer thereof is made before or after the passage of this act: *Provided*, that property which is actually vested in such persons or corporations before this act takes effect shall not be subject to the tax."

The Lewis County Circuit Court declared the transfer of the personal property not subject to taxation; the Supreme Court reached a different conclusion and directed payment.

It does not appear and is not claimed that either the decedent or her son ever resided in Missouri. The record discloses nothing tending to show that the personal property had been given a business situs in that State.

Among other things, the Supreme Court said—

"In recent cases we have held, for the purpose of *property* tax, that the situs of a credit is the domicile of the creditor, . . .

"If we could apply the same rule to an inheritance tax, we might have less difficulty in disposing of this case. The inheritance tax statute, Article XXI, Ch. 1, R. S. 1919, provides an entirely independent method of ascertaining the property subject to inheritance tax from that applicable for general tax. The definition of the term 'property' in the last section, 589, of that Article, makes inapplicable any definition relating to general property tax. An inheritance tax is not a property tax, but an excise tax, or a tax upon succession. (*In re Zook's Estate,* 317 Mo. 986, 296 S. W. 780, and cases cited.) . . .

"These notes, bonds and cash were all in the possession of the administrator in Missouri. For what purpose they were in Missouri is not shown. We cannot assume that they were in the State of Missouri for the purpose of escaping taxation in the State of Illinois. It is a reasonable inference that the cash and notes in such large quantities in Missouri, when none of it was held in Illinois, was retained in this State for the purpose of investment. They may have established a business situs in this State, in which case it would be subject to a general tax as well as the inheritance tax. . . .

"It [the personalty] possibly acquired a business situs in this State. Whether it did or not it was within the

jurisdiction of the State and property subject to the transfer tax. It would have been a proper subject of inquiry by the trial court to determine how and why and under what conditions these evidences of debt were in this State, but whatever the determination of that question the property was legally within the jurisdiction of the probate court of Lewis county in this State and subject to the tax."

The challenged judgment rests upon the broad theory that a State may lay succession or inheritance taxes measured by the value of any deposits in local banks passing from a non-resident decedent; also upon the value of bonds issued by the United States and promissory notes executed by individual citizens of the State, when devised by such non-resident, if these bonds or notes happen to be found within the confines of the State when death occurs. The cause was decided below prior to our determination of *Farmers Loan & Trust Co.* v. *Minnesota,* 280 U. S. 204. *Blackstone* v. *Miller,* 188 U. S. 189, was cited in support of the conclusion reached. Considering *Farmers Loan & Trust Co.* v. *Minnesota* and previous opinions there referred to, the theory upon which the court below proceeded is untenable and its judgment must be reversed.

Ordinarily, bank deposits are mere credits and for purposes of *ad valorem* taxation have situs at the domicile of the creditor only. The same general rule applies to negotiable bonds and notes, whether secured by liens on real estate or otherwise.

In *Kirtland* v. *Hotchkiss,* 100 U. S. 491, 498, 499, this Court declared—

"Plainly, therefore, our only duty is to inquire whether the Constitution prohibits a State from taxing, in the hands of one of its resident citizens, a debt held by him upon a resident of another State, and evidenced by the bond of the debtor, secured by deed of trust or mortgage

upon real estate situated in the State in which the debtor resides.

"The question does not seem to us to be very difficult of solution. The creditor, it is conceded, is a permanent resident within the jurisdiction of the State imposing the tax. The debt is property in his hands constituting a portion of his wealth, from which he is under the highest obligation, in common with his fellow-citizens of the same State, to contribute for the support of the government whose protection he enjoys.

"That debt, although a species of intangible property, may, for purposes of taxation, if not for all others, be regarded as situated at the domicile of the creditor. It is none the less property because its amount and maturity are set forth in a bond. That bond wherever actually held or deposited, is only evidence of the debt, and if destroyed, the debt—the right to demand payment of the money loaned, with the stipulated interest—remains. Nor is the debt, for the purposes of taxation, affected by the fact that it is secured by mortgage upon real estate situated in Illinois. The mortgage is but a security for the debt, and, as held in *State Tax on Foreign-held Bonds, supra* [15 Wall. 300], the right of the creditor 'to proceed against the property mortgaged, upon a given contingency, to enforce by its sale the payment of his demand, . . . has no locality independent of the party in whom it resides. It may undoubtedly be taxed by the State when held by a resident therein,' etc. Cooley on Taxation, 15, 63, 134, 270. The debt, then, having its *situs* at the creditor's residence, both he and it are, for the purposes of taxation, within the jurisdiction of the State."

And in *Blodgett* v. *Silberman*, 277 U. S. 1, 14—

"The question here is whether bonds, unlike other choses in action, may have a *situs* different from the owner's domicile such as will render their transfer taxable in the State of that *situs* and in only that State. We think

bonds are not thus distinguishable from other choses in action. It is not enough to show that the written or printed evidence of ownership may, by the law of the State in which they are physically present, be permitted to be taken in execution or dealt with as reaching that of which they are evidence, even without the presence of the owner. While bonds often are so treated, they are nevertheless in their essence only evidences of debt. The Supreme Court of Errors expressly admits that they are choses in action. Whatever incidental qualities may be added by usage of business or by statutory provision, this characteristic remains and shows itself by the fact that their destruction physically will not destroy the debt which they represent. They are representative and not the thing itself."

We find nothing to exempt the effort to tax the transfer of the deposits in Missouri banks from the principle applied in *Farmers Loan & Trust Co.* v. *Minnesota, supra.* So far as disclosed by the record, the situs of the credit was in Illinois, where the depositor had her domicile. There the property interest in the credit passed under her will; and there the transfer was actually taxed. This passing was properly taxable at that place and not otherwhere.

The bonds and notes, although physically within Missouri, under our former opinions were choses in action with situs at the domicile of the creditor. At that point they too passed from the dead to the living, and there this transfer was actually taxed. As they were not within Missouri for taxation purposes the transfer was not subject to her power. *Rhode Island Trust Co.* v. *Doughton,* 270 U. S. 69.

It has been suggested that should the State of the domicile be unable to enforce collection of the tax laid by it upon the transfer, then in practice all taxation thereon might be evaded. The inference seems to be that

double taxation—by two States on the same transfer—should be sustained in order to prevent escape from liability in exceptional cases. We cannot assent. In *Schlesinger* v. *Wisconsin*, 270 U. S. 230, 240, a similar notion was rejected.

"The presumption and consequent taxation are defended upon the theory that, exercising judgment and discretion, the legislature found them necessary in order to prevent evasion of inheritance taxes. That is to say, 'A' may be required to submit to an exactment forbidden by the Constitution if this seems necessary in order to enable the State readily to collect lawful charges against 'B.' Rights guaranteed by the federal Constitution are not to be so lightly treated; they are superior to this supposed necessity. The State is forbidden to deny due process of law or the equal protection of the laws for any purpose whatsoever."

If the possibility of evasion be considered from a practical standpoint, then the federal estate tax law, under which credit is only allowed where a tax is paid to the State, Sec. 1093, Title 26, U. S. C., must be given due weight. Also, the significance of the adoption of reciprocal exemption laws by most of the States, *Farmers Loan & Trust Co.* v. *Minnesota, supra*, cannot be disregarded.

Normally, as in the present instance, the State of the domicile enforces its own tax and we need not now consider the possibility of establishing a situs in another State by one who should undertake to arrange for succession there and thus defeat the collection of the death duties prescribed at his domicile.

This cause does not involve the right of a State to tax either the interest which a mortgagee as such may have in lands lying therein, or the transfer of that interest.

Reversed. The cause will be remanded to the Supreme Court of Missouri for further proceedings not inconsistent with this opinion.

MR. JUSTICE HOLMES.

Although this decision hardly can be called a surprise after *Farmers Loan & Trust Co.* v. *Minnesota,* 280 U. S. 204 and *Safe Deposit & Trust Co.* v. *Virginia,* 280 U. S. 83, and although I stated my views in those cases, still, as the term is not over, I think it legitimate to add one or two reflections to what I have said before. I have not yet adequately expressed the more than anxiety that I feel at the ever increasing scope given to the Fourteenth Amendment in cutting down what I believe to be the constitutional rights of the States. As the decisions now stand, I see hardly any limit but the sky to the invalidating of those rights if they happen to strike a majority of this Court as for any reason undesirable. I cannot believe that the Amendment was intended to give us *carte blanche* to embody our economic or moral beliefs in its prohibitions. Yet I can think of no narrower reason that seems to me to justify the present and the earlier decisions to which I have referred. Of course the words "due process of law," if taken in their literal meaning, have no application to this case; and while it is too late to deny that they have been given a much more extended and artificial signification, still we ought to remember the great caution shown by the Constitution in limiting the power of the States, and should be slow to construe the clause in the Fourteenth Amendment as committing to the Court, with no guide but the Court's own discretion, the validity of whatever laws the States may pass. In this case the bonds, notes and bank accounts were within the power and received the protection of the State of Missouri; the notes, so far as appears, were within the considerations that I offered in the earlier decisions mentioned, so that logically Missouri was justified in demanding a *quid pro quo;* the practice of taxation in such circumstances I think has been ancient and widespread.

and the tax was warranted by decisions of this Court. *Liverpool & London & Globe Ins. Co.* v. *Assessors for the Parish of Orleans,* 221 U. S. 346, 354, 355. *Wheeler* v. *Sohmer,* 233 U. S. 434. (I suppose that these cases and many others now join *Blackstone* v. *Miller* on the *Index Expurgatorius*—but we need an authoritative list.) It seems to me to be exceeding our powers to declare such a tax a denial of due process of law.

And what are the grounds? Simply, so far as I can see, that it is disagreeable to a bondowner to be taxed in two places. Very probably it might be good policy to restrict taxation to a single place, and perhaps the technical conception of domicil may be the best determinant. But it seems to me that if that result is to be reached it should be reached through understanding among the States, by uniform legislation or otherwise, not by evoking a constitutional prohibition from the void of 'due process of law,' when logic, tradition and authority have united to declare the right of the State to lay the now prohibited tax.

MR. JUSTICE BRANDEIS and MR. JUSTICE STONE agree with this opinion.

Opinion of MR. JUSTICE STONE.

I agree with what MR. JUSTICE HOLMES has said, but as I concurred, on special grounds, with the result in *Farmers Loan & Trust Company* v. *Minnesota,* 280 U. S. 204 and *Safe Deposit & Trust Company* v. *Virginia,* 280 U. S. 83, I would say a word of the application now given to those precedents. I do not think that the overturning of one conclusion in *Blackstone* v. *Miller* by those cases should be deemed to carry with it *Scottish Union & National Insurance Co.* v. *Bowland,* 196 U. S. 611, *Wheeler* v. *Sohmer,* 233 U. S. 434, upholding a tax measured by a non-resident's bonds and notes, located within the taxing

state; *Savings Society* v. *Multnomah County,* 169 U. S. 421, upholding a tax measured by a non-resident's notes, secured by mortgages on land within the taxing state; or *Bristol* v. *Washington County,* 177 U. S. 133 and *Metropolitan Life Insurance Co.* v. *New Orleans,* 205 U. S. 395, upholding a tax upon intangibles having a "business situs" within the taxing state, but owned by a non-resident. These cases rest upon principles other than those applied in *Blackstone* v. *Miller* and are not dependent upon it for support.

It is true that the bonds and notes located in Missouri are choses in action, rights in which may be transferred at the domicil of the owner as well as in any other state in which he may chance to be. But the transfer made there is not completely effected without their delivery, which ordinarily can be compelled only in Missouri and in accordance with its laws. If negotiable, which so far as appears some of them were, their transfer by delivery within Missouri could defeat the transfer made in Illinois. When secured by mortgage on real estate, the transfer of the security, which is an inseparable incident of the chose in action, *Carpenter* v. *Longan,* 16 Wall. 271, *Lipscomb* v. *Talbott,* 243 Mo. 1, 31, may be affected by the recording laws, availed of only through the recording facilities where the land is located. See *Pickett* v. *Barron,* 29 Barb. 505; *Curtis* v. *Moore,* 152 N. Y. 159, 163.

These circumstances, I think, are sufficient to give the jurisdiction which I thought lacking in *Farmers Loan & Trust Company* v. *Minnesota,* to tax the transfer in Missouri, see *Hatch* v. *Reardon,* 204 U. S. 152 and *Rogers* v. *Hennepin County,* 240 U. S. 184; to say nothing of the further fact that Missouri laws alone protect the physical notes and bonds and the security located there. Apart from the question of jurisdiction, that one must pay a tax in two places, reaching the same economic interest, with respect to which he has sought and secured the bene-

fit of the laws in both, does not seem to me so oppressive or arbitrary as to infringe constitutional limitations.

Taxation is a practical matter and if, in the choice of the rule we adopt, we may, as the Court has said in *Farmers Loan & Trust Company* v. *Minnesota,* give some consideration to its practical effect, we ought not, I think, to overturn long established rules governing the constitutional power to tax, without some consideration of the necessity and of all consequences of the change. Under the law as it has been, no one need subject himself to double taxation by keeping his securities in a state different from his domicil, or by seeking the protection of its laws for his mortgage investments. But it is a practical consideration of some moment that taxation becomes increasingly difficult if the securities of a nonresident may not be taxed where located, and where alone they may be reached, but where the courts are not open to the tax gatherers of the domicil. See *Moore* v. *Mitchell, ante,* p. 18, 30 F. (2d) 600; *Colorado* v. *Harbeck,* 232 N. Y. 71.

It is said that the present record discloses nothing tending to show that the decedent's personal property had been given a business situs in Missouri. The Supreme Court of Missouri said: "It is a reasonable inference that the cash and notes in such large quantities in Missouri, when none of it was held in Illinois, was retained in this state for the purpose of investment. They may have established a business situs in this state. . . ."

The burden is not on the state to establish the constitutionality of its laws, nor are we limited in supporting their constitutionality to the reasons assigned by the state court. I do not assume, from anything that has been said in this or the earlier cases, that constitutional power to tax the transfer of notes and bonds at their business situs, no longer exists. As this Court has often held, the burden rests upon him who assails a statute to

establish its unconstitutionality. Upon this ambiguous record it is for the appellant to show that the stock and bonds subjected to the tax had no business situs within the taxing jurisdiction. See *Corporation Commission of Oklahoma* v. *Lowe, ante,* p. 431; *Toombs* v. *Citizens Bank of Waynesboro,* decided this day, *post,* p. 643.

MR. JUSTICE HOLMES and MR. JUSTICE BRANDEIS join in this opinion.

CAMPBELL, FEDERAL PROHIBITION ADMINISTRATOR, ET AL. *v.* GALENO CHEMICAL COMPANY ET. AL.

SAME *v.* D. P. PAUL & COMPANY, INCORPORATED.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

Nos. 443 and 444. Argued April 25, 1930.—Decided May 26, 1930.

1. A basic permit granted under § 4, Title II, of the Prohibition Act, to manufacture articles such as toilet, medicinal and antiseptic preparations, containing intoxicating liquor but unfit for beverage purposes, is not within the provision of § 6 that "permits to manufacture, prescribe, sell or transport liquor . . . shall expire on the 31st day of December next succeeding the issuance thereof." P. 606.
2. Such a basic permit issued under § 4, to be in force until "revoked, suspended or renewed as provided by law or regulations," sufficiently complies with the provision of § 6 (assuming but not deciding it to be applicable,) that every permit shall designate the time when the permitted acts may be performed. P. 608.
3. Such a basic permit issued under § 4 to remain in force "until revoked, suspended or renewed as provided by law or regulations," is not subject to be revoked by a subsequent regulation fixing a time limit for unexpired permits, but is revocable only for cause as provided in §§ 5 and 9, upon notice and hearing, with a right to judicial review. P. 609.

4. Regulations issued under a statute may not extend or modify its provisions. P. 610.

34 F. (2d) 642, affirmed.

CERTIORARI, 280 U. S. 548, to review decrees of the Circuit Court of Appeals affirming decrees of injunction in two suits against a Prohibition Administrator, the Commissioner of Prohibition, and the Secretary of the Treasury to restrain the revocation of permits issued to the plaintiffs under § 4 of the Prohibition Act.

Assistant Attorney General Youngquist, with whom *Attorney General Mitchell, Messrs. Mahlon D. Kiefer* and *John H. McEvers* were on the brief, for petitioner.

Permits to manufacture "liquor" may be issued for one year, but they expire by operation of law "on the 31st day of December next succeeding the issuance thereof." (§ 6, Title II, National Prohibition Act.) At the time of being manufactured and before being prepared for the market, denatured alcohol and medicinal preparations containing more than one-half of one per cent. of alcohol by volume are "liquor" within the meaning of § 6. Permits to manufacture denatured alcohol and medicinal preparations are therefore permits to manufacture "liquor," and expire by operation of law "on the 31st day of December next succeeding the issuance thereof." *Higgins* v. *Foster,* 12 F. (2d) 646; *Cywan* v. *Blair,* 16 F. (2d) 279; *Chicago Grain Products Co.* v. *Mellon,* 14 F. (2d) 362; *United States* v. *Woodward,* 256 U. S. 632.

If permits to manufacture denatured alcohol and medicinal preparations be not permits to manufacture "liquor," nevertheless every permit which the Commissioner is authorized to issue must "designate and limit the acts that are permitted and the time when and place where such acts may be performed." § 6, Title II. When

Congress used the words "designate" and "limit" it meant a definite designation and a definite limitation. Accordingly, a permit having an indefinite time limitation was unauthorized. Regulations 2 and 3 brought the practice into accord with the statute and are therefore valid. See *Higgins* v. *Mills*, 22 F. (2d) 913. *Driscoll* v. *Campbell*, 33 F. (2d) 281; *Lewellyn* v. *Harbison*, 31 F. (2d) 740; *Chicago Grain Products Co.* v. *Mellon*, 14 F. (2d) 362; *Yudelson* v. *Andrews*, 25 F. (2d) 80.

If Congress did not provide for the termination of § 4 permits on definite dates, it left the matter open to control by regulations to be issued from time to time. The exercise of a delegated power is not to be once used and forever lost. The administrative officers, acting in a field inherently subject to police regulations, could not bargain away the rights of the public in such manner as to preclude the future exercise of the powers delegated. Section 9, Title II, of the National Prohibition Act has reference to functions judicial in their nature conferred on the administrative officers; to inquiries as to whether an individual permit should be revoked. It in no way relates to the delegated quasi-legislative power to establish regulations.

Mr. John Fletcher Caskey argued the cause and submitted a brief for respondents, and *Mr. Charles Dickerman Williams* also submitted a brief for respondents.

Mr. Justice Brandeis delivered the opinion of the Court.

These cases deal with the power of the Commissioner of Prohibition to revoke basic permits to use intoxicating liquors in the manufacture of medicinal preparations. Section 6 of the National Prohibition Act, October 28, 1919, c. 85, Title II, 41 Stat. 305, 310, declares: "No one shall manufacture, sell, purchase, transport, or prescribe

any liquor without first obtaining a permit from the commissioner so to do. . . . All permits to manufacture, prescribe, sell, or transport liquor may be issued for one year, and shall expire on the 31st day of December next succeeding the issuance thereof: *Provided,* . . . That permits to purchase liquor for the purpose of manufacturing or selling as provided in this Act shall not be in force to exceed ninety days from the day of issuance."

Section 4 of the Act provides that the "articles" therein enumerated, including toilet, medicinal and antiseptic preparations, although containing intoxicating liquor, "shall not, after having been manufactured and prepared for the market, be subject to the provisions of" the Act; and that the use of intoxicating liquor in the manufacture of such "articles" is authorized under certain restrictions. Manufacturers are required under this section to procure two permits: one, the basic permit here involved, granting general authority to manufacture such preparations with an alcoholic content; the other, a supplemental permit granting special authority to purchase liquor for that purpose and limited by § 6 to not more than ninety days from the date of issuance. Treasury Dept., Bureau of Internal Revenue, Regulations 60, (1924), §§200, 201, 221, 403; Prohibition Bureau, Regulations 2, (1927) §§ 201, 203, 404.

Section 5 of the Act prescribes that, upon due notice and hearing, the Commissioner of Internal Revenue (after Act of March 3, 1927, c. 348, 44 Stat. 1381, the Commissioner of Prohibition) may revoke permits granted under § 4 for failure to conform the manufactured "articles" with the "descriptions and limitations" of that section; and gives to the manufacturer the right to have the action of the Commissioner reviewed "by appropriate proceeding in a court of equity." Section 9 provides that, upon due notice and hearing, the Commissioner may revoke the permit of "any person who has a permit" and who

" is not in good faith conforming to the provisions of this Act, or has violated the laws of any State relating to intoxicating liquor"; and subjects the action of the Commissioner to judicial review as provided in § 5. Compare *Ma-King Products Co.* v. *Blair,* 271 U. S. 479.

For some years prior to October 1, 1927, the plaintiffs in these two cases had been engaged in the business of manufacturing medicinal preparations and held basic permits issued under § 4 of the Act. Each permit authorizes the use of whiskey in the manufacture of a particular product in accordance with a special formula; was issued pursuant to regulations in force at the time of issuance; and declares that it shall remain in force " until revoked, suspended or renewed as provided by law or regulations."[1] On September 2, 1927, the Treasury Department, Bureau of Prohibition, issued Regulations 2, effective October 1, 1927, in which it is provided by § 218 that " all permits issued and in force and effect on the effective date of these regulations shall expire on December 31, 1928, unless renewed in the manner hereinafter specified . . ." and that thenceforth only annual permits shall be issued.[2] The provision was made ap-

[1] The permits provide also: " If this permit requires a supporting bond, the failure to keep such bond in force will *ipso facto* suspend this permit; and this permit may be revoked, suspended, modified, amended, supplemented, extended, or renewed in the manner and for the causes set forth in regulations 60, or specifically set forth herein, or agreed to by the permittee, or otherwise provided by law."

[2] The original regulations issued by the Bureau of Internal Revenue under Title II of the Act, called Regulations 60, effective January 17, 1920, provided in § 18 for permits of annual duration only. On March 14, 1924, Regulations 60 were revised and § 260 provided that all basic permits should be of annual duration; but that type " H " permits, to use liquor in the manufacture of articles " unfit for use for beverage purposes," which are the permits held by these plaintiffs, should be valid " so long as the supporting bond required by these regulations remains in full force and effect, or until canceled, suspended, revoked, or voluntarily surrendered by the permittee." In-

plicable to the basic permits issued under § 4 of the Act to persons engaged in the business of manufacturing medicinal preparations " that are unfit for use for beverage purposes." The plaintiffs, without indicating any intention to waive their rights under existing permits and for the purpose of safeguarding themselves, accordingly filed applications for renewal of their permits.

On December 1, 1928, the Commissioner of Prohibition, having concluded that the use of whiskey by such permittees under § 4 was susceptible of grave abuse and that proper supervision of manufacturing operations involving the use of whiskey could not be maintained by the inspection force, instructed all federal prohibition administrators to grant hearings to applicants for renewal of such permits for the purpose of determining whether or not whiskey is a necessary ingredient in the articles produced by them; to afford them an opportunity to present such evidence as they could to establish that alcohol or other spirits would not properly serve for extraction and solution of the ingredients contained in their products and for the preservation thereof; and to deny permits for the use of whiskey after December 31, 1928, unless its indispensability was clearly demonstrated. The Federal Administrator for the district, acting on these instructions,

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ternal Revenue Treasury Decision 3773, made on November 14, 1925, anounced that all permits theretofore granted would expire on December 21, 1925, and that thereafter only annual permits would be issued. See also T. D. 3774. The decision was declared void on June 1, 1926, by the United States Circuit Court of Appeals for the Second Circuit in *Higgins* v. *Foster*, 12 F. (2d) 646. Thereupon, the Bureau, by T. D. 3925, approved on September 1, 1926, declared that " H " permits would be deemed valid until surrendered or revoked. But, on November 9, 1926, the United States Circuit Court of Appeals for the Seventh Circuit held in *Chicago Grain Products Co.* v. *Mellon*, 14 F. (2d) 362, that a permit to manufacture denatured alcohol was subject to the one year limitation prescribed by § 6 of the Act. Thereafter, § 218 here in question was incorporated in Regulations 2, revising Regulations 60.

notified the several plaintiffs accordingly and fixed dates for their hearings. Compare *Liscio* v. *Campbell*, 34 F. (2d) 646.

These suits were then brought by the permittees in the federal court for southern New York, against the Prohibition Administrator, the Commissioner of Prohibition and the Secretary of the Treasury to enjoin them from enforcing § 218 of Regulations 2; from proceeding with the proposed hearings concerning the use of whiskey; and from otherwise interfering with the permits held by them. The plaintiffs alleged that their permits contained no date of expiration and had never been revoked, cancelled or surrendered; that they were entitled to have their permits remain in force until they should be revoked pursuant to proceedings under §§ 5 and 9, and that no proceeding for such revocation had been brought. They charged that insofar as Regulations 2 purported to revoke, limit or suspend, without the hearing provided for in §§ 5 and 9, permits theretofore granted to the plaintiffs, it is void as in violation of the Act; that the proposed hearings are without legal warrant; and that the threatened action of denying the further use of whiskey is unauthorized and illegal. The trial court granted an injunction in each case.[3] The decrees were affirmed by the United States Circuit Court of Appeals for the Second Circuit.[4] *Lion*

[3] The injunctions granted were interlocutory only. As to two of the original plaintiffs, Lion Laboratories, Inc., and Max Daub, an order of dismissal was granted, because their permits had expired by the express terms contained therein. These two plaintiffs appealed to the Circuit Court of Appeals, where the dismissal was affirmed. But they are not parties in this Court. The Commissioner of Internal Revenue had been joined as defendant; but the Circuit Court of Appeals held he was not a proper party and the bills were dismissed as against him. The plaintiffs acquiesced in this holding.

[4] In the Circuit Court of Appeals, the cases were presented by all parties as tests of the merits of the bills. That court, therefore, passed "the question whether it was proper to grant an injunction pendente lite at all," saying: "If the bill rested upon section 9 of

Laboratories, Inc. v. *Campbell,* 34 F. (2d) 642. This Court granted writs of certiorari. 280 U. S. 548.

First. The Government contends that § 1, Title II, of the Act defines the word "liquor" as meaning not only the beverages specifically named but also any liquids "containing one-half of 1 per centum or more of alcohol by volume which are fit for use for beverage purposes"; that liquids which are not immediately fit for use as beverages are yet "fit for use for beverage purposes" if they can be made potable by a simple process; that plaintiffs' preparations are of that character;[5] that they are expressly excluded from the Act only "after having been manufactured and prepared for the market"; that,

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title 2, National Prohibition Act (27 U. S. C. A., § 21) certainly it was not; if it depended upon the general equity powers of the court, we do not decide whether the policy manifested in section 9 applies, when there has been no hearing before the commissioner, and when, as here, the revocation was by regulation (section 218, Regulation 2, October 1, 1927)." 34 F. (2d) 642, 643. In this Court, too, the decrees were treated as final decrees on the merits of the bills.

The decision of the Circuit Court of Appeals on the merits is in accord with its prior decision in *Higgins* v. *Foster, supra,* note 2, and with *Casper* v. *Doran,* 30 F. (2d) 400 (D. C. E. D. Pa.) but is in direct conflict with the *Chicago Grain Products* case, *supra,* note 2, and also with *Cywan* v. *Blair,* 16 F. (2d) 279 (D. C. N. D. Ill.), which expressly refused to follow the *Higgins* case.

[5] The argument is that pure alcohol is not immediately fit for beverage use; but that it may be mediately fitted for that purpose by adding water. Alcohol is unquestionably liquor. It is therefore urged that the same is true of any liquid which, like alcohol, is immediately or mediately fit for use as a beverage and otherwise answers the definition of "liquor." Aside from the argument developed in the text, there are two short answers to this contention. First, alcohol is expressly included in the definition of "liquor" in § 1. No argument can, therefore, be based on the fact that pure alcohol is not immediately fit for use as a beverage. Second, there is no evidence whatever in the record that the plaintiffs' preparations can mediately be fitted for that purpose by the simple process of adding water,—or by any other process.

at the time of manufacture and before preparation for the market, they fall within the term "liquor" as used in the Act; that permits to manufacture the "articles" enumerated in § 4 of the Act are, therefore, permits to manufacture "liquor" within the meaning of the provision in § 6 that "permits to manufacture, prescribe, sell, or transport liquor . . . shall expire on the 31st day of December next succeeding the issuance thereof"; and that, although by their own terms the plaintiffs' permits are to be in force "until revoked, suspended or renewed as provided by law or regulations," they have expired ere this by the operation of § 6. *Cywan* v. *Blair,* 16 F. (2d) 279; *Chicago Grain Products Co.* v. *Mellon,* 14 F. (2d) 362.[6]

We are of opinion that the quoted provision of § 6 is inapplicable to the permits held by the several plaintiffs. Whether or not the preparations manufactured by the plaintiffs are "liquor" while being manufactured and before they are prepared for the market is wholly immaterial. We are not here concerned with the nature of the preparations in their varying stages of development. Our concern is with the object of the permits. This object, and the permission granted, is not simply to manufacture varyingly unfinished products; but to manufacture specified articles containing whiskey, alcohol or other spirits. The products are, by § 4, called "articles" and are expressly excluded from the effect of the term "liquor." Moreover, § 4 authorizes the issuance of permits for the use of whiskey, etc., in the manufacture of medicinal and

[6] It is unnecessary for us to consider in these cases whether future applicants for basic permits under § 4 may insist on the grant of permits containing no calendar date of expiration; or whether future permits may properly restrict the use of whiskey only to cases where whiskey is an absolutely necessary ingredient and no other spirits or alcohol will properly serve for the extraction and solution of ingredients contained in the preparations and for the proper preservation thereof.

other preparations only "that are *unfit* for use for beverage purposes"; while "liquor" is defined in § 1 as meaning liquids, in addition to those enumerated, "which are *fit* for use for beverage purposes." The two definitions are mutually exclusive. If the article to be manufactured is fit for use for beverage purposes, and therefore liquor, a permit under § 4 cannot be issued; and *vice versa*. By express and obvious enactment, therefore, the permits held by the plaintiffs are not permits to manufacture liquor and are not within the expiration limit prescribed by § 6.

Second. The Government contends also that because plaintiffs' permits, whatever their character, do not provide a calendar date of expiration, they are void or voidable for failure to comply with the further provision of § 6 that every permit "shall designate and limit the acts that are permitted and the time when and the place where such acts may be performed," even though they complied with the regulations in force at the time of issuance. This contention rests wholly upon the assertion that the grant of a permit to be in force until "revoked, suspended or renewed as provided by law or regulation" is not definite.

It has been questioned whether Congress intended to make this provision apply to permits issued under § 4; but we do not express any opinion on that question. Even if applicable, this provision in § 6 does not declare that permits must expire by the calendar. The limitation that the permits shall be in force until revoked, suspended or renewed in accordance with the law or regulations is a sufficient compliance with the general requirement of the designation of the time when the permitted acts may be performed. When a calendar date is required § 6 so states specifically. Ninety days for permits to purchase liquor for the purpose of manufacturing and selling; thirty days for permits to purchase for any other purpose; December 31st next succeeding the date of issuance for permits to manufacture, prescribe, sell or transport liquor.

It is true, that permits for short periods terminating upon definite dates would leave the Bureau much freer in the exercise of its discretion than it could be under indeterminate permits revocable only for cause, established pursuant to §§ 5 or 9. Every permittee applying for a renewal has the burden of establishing his fitness;—whereas, if permits are terminable only by revocation pursuant to the provisions in §§ 5 and 9 the burden to justify closing the business because of some violation of the Act or of the regulations is put upon the Government. But § 6, as well as the rest of the Act, draws an obvious distinction between the manufacture, etc., of intoxicating liquor and that of industrial alcohol and the preparations enumerated in § 4. The former is forbidden, except for certain specified purposes for which liquor is deemed necessary. The latter is ordinarily lawful; and it is the express purpose of the Act to encourage it. *United States* v. *Katz,* 271 U. S. 354, 359. Regulations are imposed only for the purpose of guarding against the diversion of this lawful business into the unlawful business of supplying intoxicating liquor.[7] It is entirely consistent with the avowed purposes of the Act, that the restrictions on the one business should be more severe than those on the other.

Third. Finally, the Government contends that even if Congress did not provide for the termination on some definite date of permits issued under § 4, it left the matter continuously open to control by regulations to be issued from time to time; that §§ 5 and 9 are not limitations upon this quasi-legislative police power; that the express provisions of the permits cannot have the effect of bargaining away such later exercise of that power as may be deemed appropriate; and that the regulation of

[7] Compare "Industrial Alcohol," a monograph issued by the Treasury Department, Bureau of Prohibition (Gov't Ptg. Office, 1930).

October 1, 1927, is a valid exercise of that power. This contention, also, is unsound.

The limits of the power to issue regulations are well settled. *International Ry. Co.* v. *Davidson*, 257 U. S. 506, 514. They may not extend a statute or modify its provisions. The regulation of October 1, 1927, purports to revoke unexpired permits as of December 31, 1928, without resort to the proceedings prescribed by §§ 5 and 9. It thus attempts to deprive permittees of rights secured to them by these sections of the Act. As was said in *Higgins* v. *Foster*, 12 F. (2d) 646, 648: "We cannot see that the Commissioner, under the guise of legislation, may do in gross what he had no power to do in detail." Whether or not the power to make regulations, or the provision in § 6, authorizes the Bureau to fix expiration dates for permits when issued, it does not authorize the revocation of existing permits in violation of the express provisions of the Act.

Affirmed.

CAMPBELL, FEDERAL PROHIBITION ADMINISTRATOR, ET AL. *v.* W. H. LONG & COMPANY, INCORPORATED.

WYNNE, FEDERAL PROHIBITION ADMINISTRATOR, ET AL. *v.* SWANSON CHEMICAL CORPORATION.

DORAN, PROHIBITION COMMISSIONER, *v.* CASPER.

CERTIORARI TO AND CERTIFICATES FROM THE CIRCUIT COURTS OF APPEALS FOR THE SECOND AND THIRD CIRCUITS, RESPECTIVELY.

Nos. 445, 510 and 511. Argued April 25, 1930.—Decided May 26, 1930.

1. A permit to manufacture denatured alcohol under the Prohibition Act, (§ 4, Title II, § 10, Title III,) is not a permit to manufacture

"liquor," within the meaning of §§ 1 and 6, Title II, the latter of which provides that permits to manufacture "liquor" may be issued for only one year. P. 615.

2. A provision in a permit that it shall be in force until surrendered by the holder or canceled by the Commissioner of Internal Revenue for violation of the National Prohibition Act or regulations made pursuant thereto complies with the requirement of § 6, Title II of the Act, that every permit "shall designate and limit the . . . time when" the authorized acts may be performed. *Id.*

3. A permit to operate a denaturing plant, which permit provides that it shall be in force until surrendered by the holder or canceled by the Commissioner of Internal Revenue for violation of the National Prohibition Act or regulations made pursuant thereto, may not be terminated by a general regulation providing that all such permits shall expire on a date named. *Id.*

4. A permit to use specially denatured alcohol in the manufacture of toilet preparations, which provides that it shall be in effect until surrendered by the holder or canceled by the Commissioner of Internal Revenue for violation of the provisions of Title III of the National Prohibition Act or the regulations made pursuant thereto, may not be terminated by a general regulation providing that all such permits shall expire on a date named. P. 617.

34 F. (2d) 645, affirmed.
Certified questions answered.

THESE CASES are like those dealt with in the opinion on p. 599, *ante*. The first of them came here by certiorari to review a decree affirming an injunction. In the other two, decrees of the District Court granting injunctions, 30 F. (2d) 400, were appealed to the Circuit Court of Appeals, which sent up questions by certificate.

Assistant Attorney General Youngquist, with whom *Attorney General Mitchell*, *Messrs. Mahlon D. Kiefer* and *John H. McEvers* were on the brief, for Campbell, Wynne, and Doran.

A permit to use specially denatured alcohol is to be distinguished from a permit to use liquor. The manufacture and use of liquor is governed by the statutory

permit system. The manufacture of denatured alcohol requires the use of alcohol and is therefore also governed by the statutory permit system. Denatured alcohol, however, after having been manufactured and prepared for the market (for use) is expressly excluded from the provisions of the National Prohibition Act and is not to be treated as liquor. The use of denatured alcohol, and its alcoholic content, tax free, is controlled entirely by regulations. Permits may or may not be required. Having the authority to require permits, the administrative officers have the authority to provide for their revocation. Revocations are governed by regulations, and not by statute. Section 9 of Title II relates to the revocation of statutory permits. It has no relation to permits required solely by regulations. The power to issue regulations includes the power to repeal, amend, or modify such regulations. The promulgation of Article 113 of Regulations 3 was a valid exercise of that power.

If, however, it be held that § 9 of Title II applies to the revocation of a permit to use denatured alcohol, § 6 of Title II likewise has application.

Mr. Lewis Landes submitted for W. H. Long & Company.

Mr. Harry S. Barger submitted and *Mr. Michael Serody* was on the brief for Swanson Chemical Corporation.

Mr. Patrick J. Friel submitted for Casper.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

These three cases deal with basic permits concerning denatured alcohol. They were argued together with Nos.

443 and 444, *Campbell* v. *Galeno Chemical Co., ante,* p. 599, decided this day, and involve, in the main, the same questions.

In Nos. 445 and 510, the permits involved authorize the operation of denaturing plants, the purchase and receipt of alcohol thereat, and the removal therefrom of the denatured alcohol. In No. 511, the permit authorizes the use of specially denatured alcohol [1] in the manufacture of toilet preparations.[2] In each of the three cases the permit was issued prior to October 1, 1927, and was in accordance with the regulations in force at the date of issuance.[3] Each permit provides in terms that it shall be in force "from the date hereof until surrendered by the holder or cancelled by the Commissioner of Internal

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[1] "Completely denatured alcohol is alcohol which has been denatured by a limited number of fixed formulae, for sale to the general public with very little supervision. Specially denatured alcohol is alcohol which is not as completely denatured as the 'completely,' and can only be obtained under a heavy bond for use in manufacturing processes in which the alcohol is always protected by the bond."—Treasury Dept., Internal Revenue Regulations 61, Jan. 31, 1920 (T. D. 2986), Art. 92. "Specially denatured alcohol is ethyl alcohol so treated with denaturants as to permit its use in a greater number of specialized arts and industries than completely denatured alcohol." Regulations 61, revised July 1925, Art. 88.

[2] As in Nos. 443 and 444, two permits are required from the plaintiffs in these cases. One, the basic permit conferring general authority to engage in the business; the other, a supplemental permit, issued from time to time, granting authority for specific withdrawals of alcohol or specially denatured alcohol. Only the basic permits are here involved.

[3] The first regulations promulgated under the Prohibition Act, Regulations 61, January 31, 1920, provided that permits to operate denaturing plants and permits to use specially denatured alcohol in manufacture should "remain in force until voluntarily surrendered or cancelled."—Articles 97 and 115. These provisions were continued in Articles 93 and 111 of Regulations 61, revised July 1925. These Regulations were superseded by Regulations 3, discussed in the text.

Revenue for violation of the national prohibition act [4] or regulations made pursuant thereto."

While the permits of the several plaintiffs were still in force, the Treasury Department, Bureau of Prohibition, promulgated Regulations 3, effective October 1, 1927. Article 95 thereof provides that all basic permits theretofore issued to operate denaturing plants and manufacture denatured alcohol shall expire on December 31, 1928, unless renewed; and that thereafter only annual permits shall be issued. Article 113 makes the same provision for permits to use specially denatured alcohol in the manufacture of toilet and other preparations. The plaintiffs, insisting on the effectiveness of their original permits, filed applications for renewal, which were denied. These suits were then brought to enjoin interference with their permits otherwise than in accordance with the provisions of § 9 of the Act, considered in the *Galeno* case. In No. 445 an injunction was issued by the trial court; the decree was affirmed by the Circuit Court of Appeals for the Second Circuit, 34 F. (2d) 645; and we granted certiorari, 280 U. S. 548. Injunctions were granted by the trial court also in Nos. 510 and 511, 30 F. (2d) 400 [5]; appeals were taken to the Circuit Court of Appeals for the Third Circuit; and these cases are here on certificates from that court.

Among the "articles" enumerated in § 4, Title II, of the National Prohibition Act, (Oct. 28, 1919, c. 85, 41 Stat. 305, 309), which may be manufactured with the use of liquor, under permits, and which are excepted from operation of the act "after having been manufactured and prepared for the market," are: "(a) Denatured al-

[4] The permit in No. 511 reads: "for violation of the provisions of Title III of the national" etc.

[5] The District Court's opinion in No. 510 is not yet reported. The case was heard by the court together with No. 511 and was disposed of on the same grounds as No. 511. [Since reported, 41 F. (2d) 784.]

cohol . . . produced and used as provided by laws and regulations now or hereafter in force. . . . (d) Toilet . . . preparations and solutions that are unfit for use for beverage purposes." Title III, headed "Industrial Alcohol" provides, in § 10: "Upon the filing of application and bond and issuance of permit, denaturing plants may be established . . . and shall be used exclusively for the denaturation of alcohol by the admixture of such denaturing materials as shall render the alcohol, or any compound in which it is authorized to be used, unfit for use as an intoxicating beverage. Alcohol lawfully denatured may, under regulations be sold free of tax either for domestic use or for export." There is no provision in the Act specifically requiring permits for the manufacture of toilet preparations with denatured alcohol.

First. The contentions of the Government in Nos. 445 and 510 are those already considered in *Campbell* v. *Galeno Chemical Co., supra.* The questions certified in No. 510 are:

"1. Is denatured alcohol, during its manufacture and preparation for the market, 'liquor' within the meaning of sections 1 and 6, Title II, of the national prohibition act, the latter of which provides that permits to manufacture 'liquor' may be issued for only one year?

"2. Does the provision of section 6, Title II, of the national prohibition act, which directs that every permit 'shall designate and limit the . . . time when' the authorized acts may be performed, apply to a permit to operate a denaturing plant, i. e., to use alcohol in the manufacture of denatured alcohol?

"3. Does a provision in a permit that it shall be in force until 'surrendered by the holder or canceled by the Commissioner of Internal Revenue for violation of the national prohibition act or regulations made pursuant thereto,' comply with the above-mentioned requirement of section 6 of Title II of the national prohibition act, that

every permit 'shall designate and limit the . . . time when' the authorized acts may be performed?

"4. May a permit to operate a denaturing plant, which permit provides that it shall be in force 'until surrendered by the holder or canceled by the Commissioner of Internal Revenue for violation of the national prohibition act or regulations made pursuant thereto,' be terminated by a general regulation providing that all such permits shall expire on a date named?"

We interpret the first question as inquiring whether a permit to manufacture denatured alcohol is a permit to manufacture liquor within the cited provision of § 6.[6] As thus construed, we answer it in the negative. For, whether issued under § 4, Title II or under § 10, Title III, the permits held by plaintiffs authorize them to convert something which is undoubtedly liquor into a product which is required to be unfit for use as a beverage; that is, to convert liquor into something which is not liquor.[7] *Campbell* v. *Galeno Chemical Co., supra.* For

[6] If read literally, the first question is irrelevant to a decision and need not be answered. For, calling the solution "liquor" during its manufacture and preparation for the market—that is, before it is fully denatured and becomes the "article," denatured alcohol—does not aid in determining whether or not a permit to operate a denaturing plant and manufacture denatured alcohol is a permit "to manufacture . . . liquor." The character of the permit is determined, not by the nature of the solution in the process of manufacture, but by the character of the finished article authorized to be produced.

[7] We are not told what denaturants plaintiffs use; but we are asked to take judicial notice that denatured alcohol may be fitted for beverage purposes by extracting the denaturant. We may also take judicial notice that some denaturants cannot be successfully extracted; and that any denaturant must be "such that it can not be removed from the mixture and the treated product made fit for beverage purposes without great difficulty." See "Industrial Alcohol," a monograph issued by the Treasury Dept., Bureau of Prohibition, p. 4 (Gov't Ptg. Office, 1930). Moreover, from the standpoint of caution, denatured alcohol, however treated, is not fit for beverage purposes.

the reasons stated in that case, our answer to the third question is in the affirmative; and to the fourth question in the negative. In view of the answer to the third question, the second question need not be answered.

Second. In No. 511, the Circuit Court of Appeals certified the following questions:

"1. Does the provision of section 6, Title II, of the national prohibition act, which directs that every permit 'shall designate and limit the . . . time when' the authorized acts may be performed, apply to a permit to use specially denatured alcohol?

"2. (Same as question 3 in No. 510).[8]

"3. May a permit to use specially denatured alcohol in the manufacture of toilet preparations, which permit provides that it shall 'be in effect until surrendered by the holder or cancelled by the Commissioner of Internal Revenue for violation of the provisions of Title III of the national prohibition act or the regulations made pursuant thereto,' be terminated by a general regulation providing that all such permits shall expire on a date named?"

In this Court, the Government concedes that the permit here involved is not one to manufacture liquor within the meaning of either the special or the general time provisions of § 6. It contends, however, that since toilet preparations and denatured alcohol used in their manufacture are both excluded by § 4 from the operation of the Act, the plaintiff's business is not one for which a permit is required by the statute; that if the plaintiff used so-called completely denatured alcohol, no permit would be required at all, Regulations 61 (1920), Art. 108; Regulations 3 (1927), Art. 106; that permits for the use of specially denatured alcohol are required only by the regulations of the Bureau pursuant to its general authority, conferred, among other sections, by § 13, Title III, to

[8] Except for the slight variation in the language of the permit mentioned in note 1, *supra*, and quoted in the third question.

make regulations to guard against the diversion of alcohol for unlawful purposes and to protect the public revenue; that the power to issue regulations includes the power to repeal and amend them; that § 9, Title II, applies only to the permits required by statute and does not abridge the regulatory power with respect to permits required only by administrative regulation. The conclusion is, in our opinion, unsound.

Since no question has been raised as to the propriety of plaintiff's permit, we do not inquire whether the permit is required by the Act or whether its requirement by regulations is authorized thereby. But, if the requirement of the permit is proper, it is so only because it is authorized by the Act, either explicitly or otherwise. There is no suggestion that the regulations were made under any other authority. If, then, the permit was issued under authority of the Prohibition Act, the plaintiff comes within the description in § 9 of "any person who has a permit"; and that section provides the exclusive procedure for the revocation of the permit. The attempt to revoke it by regulations without complying with that section exceeds the authority, and violates rights, conferred by the Act.[9]

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[9] The Government urges that under Act of October 3, 1913, c. 16, Section IV, N, subsec. 2, 38 Stat. 114, 199 and Act of June 7, 1906, c. 3047, 34 Stat. 217 (U. S. C., Tit. 26, §§ 481–487), the requirement of permits for the manufacture and denaturation of alcohol tax free, in special cases, was governed entirely by regulations; that permits under the regulations made pursuant to those Acts were limited to specific amounts of alcohol (Regulations 30, Art. 60, 61, 77–90); that §§ 10 and 11, Title III of the Act treat of similar subjects; and that the Prohibition Act, as shown by the report of the House Judiciary Committee (H. R. Report No. 91, 66th Cong., 1st sess., p. 2) purports to continue the policy of the prior Acts and regulations. There is a decisive difference between the Prohibition Act and those statutes. The latter are silent on the whole subject of permits; the former specifically provides how permits should be revoked. Moreover, the plaintiffs in Nos. 443 and 444,

We answer the third question in the negative. For reasons stated in connection with questions 2 and 3 in No. 510, we answer the second question in the affirmative; and do not answer the first.

No. 445—Affirmed.
No. 510—Question 1 answered No.
Question 2 not answered.
Question 3 answered Yes.
Question 4 answered No.
No. 511—Question 1 not answered.
Question 2 answered Yes.
Question 3 answered No.

UNITED STATES v. NORRIS.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

No. 555. Argued April 28, 1930.—Decided May 26, 1930.

1. After entry of a plea of *nolo contendere* to an indictment charging conspiracy unlawfully to transport intoxicating liquors in violation of the National Prohibition Act, a stipulation of facts filed by a

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relying on the same and even more specific portions of the House Committee report referring to the Lever Act, August 10, 1918, c. 53, §§ 15 and 16, 40 Stat. 276, 282, the Revenue Act of 1918, February 24, 1919, c. 18, 40 Stat. 1057, 1105–16, and Internal Revenue T. D. 2788, make quite as cogent an argument for a contrary conclusion. We need not consider the merits of either argument. For, we are of opinion that § 9 is applicable to the permits involved in all these cases. There is no need to seek light from debatable inferences from a general statement in the Committee report.

The Government also points out that, aside from the decisions in Nos. 443, 444, 445 and 510, its contentions in No. 511 are of great importance to the administrative officers in promulgating regulations governing the use of specially denatured alcohol. Our decision merely denies the power to revoke unexpired permits in a way other than that prescribed in the Act. As in Nos. 443 and 445, we refrain from deciding whether or not the Regulations are effective as to future applicants for permits.

defendant and received by the trial court merely as evidence for its information in determining what sentence should be imposed, is ineffective to import an issue as to the sufficiency of the indictment, or an issue of fact upon the question of guilt or innocence. P. 622.

2. If the stipulation be regarded as adding particulars to the indictment, it is void under the rule that nothing can be added to an indictment without the concurrence of the grand jury by which the bill was found. *Id.*

3. Regarded as evidence upon the question of guilt or innocence, the stipulation came too late, for the plea of *nolo contendere*, upon that question and for that case, was as conclusive as a plea of guilty would have been. P. 623.

4. After a plea of *nolo contendere*, nothing remains for the court but to render judgment, as no issue of fact exists and none can be made while the plea remains of record. *Id.*

34 F. (2d) 839, reversed.

CERTIORARI, *post*, p. 707, to review a judgment of the Circuit Court of Appeals which reversed a judgment of the District Court, 29 F. (2d) 744, sentencing the respondent after a plea of *nolo contendere* to an indictment charging conspiracy to transport intoxicating liquors in violation of the National Prohibition Act.

Assistant Attorney General Youngquist, with whom *Attorney General Mitchell*, *Messrs. Mahlon D. Kiefer*, *John J. Byrne* and *A. E. Gottshall* were on the brief, for the United States.

Mr. Frederic L. Ballard, with whom *Messrs. Charles I. Thompson* and *Allen Hunter White* were on the brief, for respondent.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

Norris and one Kerper were indicted by the federal grand jury for the Eastern District of Pennsylvania, charged in two counts with conspiring unlawfully to trans-

port and cause to be transported, from Philadelphia to New York, certain shipments of intoxicating liquor, in violation of the National Prohibition Act of October 28, 1919, c. 85, § 3, 41 Stat. 305, 308; U. S. C., Title 27, § 12. The indictment is sufficient in form and substance. Kerper pleaded guilty, and Norris entered a plea of *nolo contendere*. When the latter appeared for sentence, there was filed a stipulation of facts which it was agreed should be taken to be true and of record with like effect as if set forth in the indictment. The pertinent portion of the stipulation is copied in the margin.* Thereupon, Norris submitted a motion in arrest of judgment upon the grounds

* "Defendant, Alfred E. Norris, resides at 55 East Seventy-second Street, New York City. His business is that of investment banker.

"Joel D. Kerper, the other defendant, for some years prior to the date of the indictment in the above case, conducted at premises known as 341 Walnut Street, Philadelphia, Pa., a business consisting in major part of the sale and transportation incidental to sale, of intoxicating liquors, in violation of the National Prohibition Act. Pursuant to said business, the said Joel D. Kerper supplied a large number of customers in Philadelphia, New York, and other places. In the course of his business conducted as aforesaid, the said Joel D. Kerper on the dates indicated, made the following shipments by prepaid express from Philadelphia to the said Alfred E. Norris, addressed to him at 55 East Seventy-second Street, New York City. These shipments were labeled as containing the merchandise indicated in each case, and purported to be sent by the shippers named:

[The list is omitted.]

"In all of the above cases, defendant, Joel D. Kerper, was the true shipper, instead of the fictitious shipper named; and in every instance the package contained an unlawful shipment of intoxicating liquor for beverage purposes; to wit: rye whiskey. Said shipments were made by defendant, Joel D. Kerper to defendant, Alfred E. Norris, to fill orders for rye whiskey given by said Alfred E. Norris to said Joel D. Kerper over the telephone. Payment for said rye whiskey was made from time to time by Norris to Kerper, either in cash or by check. The said rye whiskey was purchased by defendant, Alfred E. Norris, for his own consumption or that of his guests; and he was in no sense a dealer of liquor."

that upon the face of the record he was not guilty of the crime charged; that the record disclosed that he merely purchased liquor, and that this did not constitute a crime; and that the record failed to show such degree of affirmative coöperation on his part as would render him liable as a conspirator in the unlawful transportation. The motion was denied and judgment rendered against Norris, who was, thereupon, sentenced to pay a fine of two hundred dollars. The district court treated the stipulation as "evidence . . . for the information of the court in determining what sentence, if any, ought to be imposed upon the defendant Norris," which it "received and made part of the record for the limited purpose above stated." 29 F. (2d) 744. The court of appeals sustained the sufficiency of the indictment, but, considering the case upon the stipulation of facts, reached the conclusion that the transactions therein disclosed did not subject the purchaser and seller of intoxicating liquor to an indictment for conspiracy to transport, and reversed the judgment of the trial court. 34 F. (2d) 839.

In the face of an indictment good in form and substance, and of a plea thereto of *nolo contendere*, which, although it does not create an estoppel, has all the effect of a plea of guilty for the purposes of the case (*Hudson* v. *United States*, 272 U. S. 451, 455; *United States* v. *Lair*, 195 Fed. 47, 51), the stipulation was ineffective to import an issue as to the sufficiency of the indictment, or an issue of fact upon the question of guilt or innocence. If the stipulation be regarded as adding particulars to the indictment, it must fall before the rule that nothing can be added to an indictment without the concurrence of the grand jury by which the bill was found. *Ex Parte Bain*, 121 U. S. 1. If filed before plea and given effect, such a

stipulation would oust the jurisdiction of the court. *Id.*, p. 13, citing (at pp. 8, 9) *Commonwealth* v. *Mahar,* 16 Pick. 120, and *People* v. *Campbell,* 4 Parker's Cr. Cas. 386, 387, holding that the defendant's consent does not affect the rule. After the plea, nothing is left but to render judgment, for the obvious reason that in the face of the plea no issue of fact exists, and none can be made while the plea remains of record. Regarded as evidence upon the question of guilt or innocence, the stipulation came too late, for the plea of *nolo contendere,* upon that question and for that case, was as conclusive as a plea of guilty would have been. And as said by Mr. Justice Shiras in *Hallinger* v. *Davis,* 146 U. S. 314, 318, "If a recorded confession of every material averment of an indictment puts the confessor upon the country, the institution of jury trial and the legal effect and nature of a plea of guilty have been very imperfectly understood, not only by the authors of the Constitution and their successors down to the present time, but also by all the generations of men who have lived under the common law."

The court was no longer concerned with the question of guilt, but only with the character and extent of the punishment. *People ex rel. Hubert* v. *Kaiser,* 206 N. Y. 46, 51–52. The remedy of the accused, if he thought he had not violated the law, was to withdraw, by leave of court, the plea of *nolo contendere,* enter one of not guilty, and, upon the issue thus made, submit the facts for determination in the usual and orderly way.

As to whether the stipulated facts, if open to consideration, make out a case of criminal conspiracy, we express no opinion.

The judgment of the Court of Appeals is reversed and that of the District Court affirmed.

UNITED STATES *v.* FARRAR.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

No. 732. Argued April 28, 1930.—Decided May 26, 1930.

Section 6 of the National Prohibition Act, which provides that "no one shall . . . purchase . . . any liquor without first obtaining a permit from the commissioner so to do . . .," relates only to that class of persons who may lawfully be authorized to sell, purchase, or otherwise deal with intoxicating liquors for non-beverage purposes, but who proceed to do so without a permit, and does not impose any criminal liability upon the purchaser of liquor for beverage purposes. P. 631.

38 F. (2d) 515, affirmed.

APPEAL by the United States under the Criminal Appeals Act from a judgment of the District Court sustaining a motion to quash an indictment charging the purchase of intoxicating liquor in violation of the National Prohibition Act.

Assistant Attorney General Youngquist, with whom *Attorney General Mitchell* and *Mr. John J. Byrne* were on the brief, for the United States.

The question involved should be viewed in the light of the ultimate aim and purpose of the National Prohibition Act, which is to prevent the use of intoxicating liquor as a beverage. *Corneli* v. *Moore,* 257 U. S. 491; *Donnelley* v. *United States,* 276 U. S. 505; *Yudelson* v. *Andrews,* 25 F. (2d) 80. See also *Selzman* v. *United States,* 268 U. S. 466; *United States* v. *Dodson,* 268 Fed. 397; *Goldberg* v. *Yellowley,* 290 Fed. 389; *Schnitzler* v. *Yellowley,* 290 Fed. 849; *Fritzel* v. *United States,* 17 F. (2d) 965.

The failure to include the purchase of liquor in the enumeration of acts prohibited by § 3 does not establish

that Congress intended that the purchase of liquor should not be an offense.

There are many acts and omissions, some relating to transactions authorized under regulations and permits and some to transactions wholly prohibited, which, though not included in that enumeration, are unquestionably made offenses by the Act and punishable under § 29. Among them are the failure of investigating officers to report violations to the United States Attorneys (§ 2); the use or disposition of intoxicating liquor by manufacturers of denatured alcohol, medicinal or toilet preparations, flavoring extracts, etc., otherwise than as an ingredient of such articles (§ 4); the sale by any person of any of such articles for beverage purposes (§ 4); the prescribing of liquor by anyone not a physician holding a permit to do so, as well as the prescribing by such a physician of liquor otherwise than in good faith as a medicine (§ 7); the failure to keep a record of liquor manufactured, purchased for sale, sold, or transported (§ 10); the failure of the manufacturer of liquor to attach to each container thereof a prescribed label (§ 12); the advertising of where or from whom liquor may be obtained (§ 17); the maintenance of a "common nuisance" (§ 21), and the possession of property designed for the manufacture of liquor intended for illegal use (§ 25).

The purchase of liquor for a purpose not authorized by the Act is within the terms of the prohibition of § 6.

The provision of § 6 is manifestly broad enough to embrace all persons, and, therefore, to include the appellee. To confine its application to persons to whom permits may issue has the anomalous effect of making the purchase of liquor without a permit an offense under the statute if the liquor is purchased for lawful purposes, but not an offense if the liquor is purchased to be disposed of illegally. This would appear to run counter to the command of § 3 that "all the provisions of this Act shall be liberally construed

to the end that the use of intoxicating liquor as a beverage may be prevented." See *Bombinski* v. *State,* 183 Wis. 351.

There is no more reason for assuming that the failure to provide a special penalty for the purchase of liquor shows the intent of Congress not to make that act an offense than there is for assuming that the unauthorized transportation, importation, exportation and possession of liquor are not offenses because no special penalties are provided therefor. The only penalties specially imposed by Title II are those for maintaining a "common nuisance" (§ 21), and for the illegal manufacture and sale of liquor (§ 29). The penalties for all other violations of Title II are prescribed by the provision of § 29: "Any person . . . who . . . violates any of the provisions of this title, for which offense a special penalty is not prescribed, shall be fined," etc. See *Donnelley* v. *United States,* 276 U. S. 505. Manifestly, that provision is not confined to violations by permittees.

There are, however, considerations tending to show that the purchase of liquor, except as authorized by the National Prohibition Act, is not an offense under that Act. See *Lott* v. *United States,* 205 Fed. 28.

A prohibition against the purchase of liquor for beverage purposes was intentionally omitted from the Eighteenth Amendment. Cong. Rec., Vol. 55, Part 6, p. 5647 *et seq.* This does not necessarily mean that such a purchase is not made unlawful by the National Prohibition Act. Many acts not mentioned in the Amendment, including the possession of intoxicating liquor, the maintenance of a common nuisance, and the advertising of liquor, are made offenses by that Act.

Dealing with the permissive features of the Prohibition Act, see S. Rep. No. 151, p. 20, 66th Cong., 1st Sess.; H. Rep. No. 91, p. 2, 66th Cong., 1st Sess.

When discussing the origin of the bill on the floor of the House, Mr. Volstead, chairman of the Judiciary Committee, observed: "The bill was largely modeled on the Ohio law. . . . Every State, I believe, that has a prohibition law has the essential features of this bill, including Iowa, Oregon, Kansas, North Dakota, South Dakota, Minnesota, Nebraska, Idaho, Alaska, Washington, and I might mention a number of others." Cong. Rec., Vol. 58, Part 3, p. 2512.

An examination of these prohibition laws shows that only in Nebraska was the purchase of beverage liquor an offense. See further Cong. Rec., Vol. 58, Part 3, p. 2802.

Section 32, Title II, of the National Prohibition Act provides that "It shall not be necessary in any affidavit, information, or indictment to give the name of the purchaser." This apparently was intended to apply only to charges of sale and to obviate the necessity of naming the person to whom the sale was made. It can not have application to other offenses, such as possession, transportation, etc., nor of course can it have application to a charge of purchase if purchase is a crime.

From the passage of the National Prohibition Act down to the time of this indictment, a period of approximately ten years, the National Prohibition Act was construed by the administrative departments charged with its enforcement as not making the purchase of liquor an offense. The reports fail to disclose any other case in which such a charge was brought.

In the following cases courts have said *obiter* that the purchase of liquor is not an offense. *Singer* v. *United States,* 278 Fed. 415; *Vannata* v. *United States,* 289 Fed. 424; *United States* v. *Kerper,* 29 F. (2d) 744; *Norris* v. *United States,* 34 F. (2d) 839.

In *United States* v. *Katz,* 271 U. S. 354, this Court held that § 10 is one of a group of sections, including

§ 6, which apply only to those dealing in liquor for purposes authorized by the Act. The application of § 6 was not directly involved.

Mr. William H. Lewis, with whom *Mr. James A. Cresswell* was on the brief, for appellee.

The buyer of liquor was not guilty of an offence under the National Prohibition Act, and § 6 relates solely to permittees. *United States* v. *Katz,* 271 U. S. 362, and footnote; s. c., 5 F. (2d) 528.

If Congress had intended to prohibit the straight purchase of beverage liquor, we should expect to find the word "purchase" inserted in the first paragraph of § 3. There is no possibility that the word was there omitted by inadvertence, since the section is a short one, and "purchase" in regard to nonbeverage liquors is inserted in the next paragraph. Congress mentioned "purchase" in §§ 4, 6, 10, 11 and 13, and in every case the purchaser is referred to in connection with a permit.

A glance at § 29, dealing with punishments, is illuminating. The first paragraph obviously deals with violations of the law by others than permittees. It is noted that the word "purchase" does not appear in this clause. The Government finding no penalty for the alleged offense of purchasing liquor either in the first or second clause, relies upon the third; "or violates any of the provisions of this title, for which offense a special penalty is not prescribed." It might be pertinent to ask, What "provision of this title" has the purchaser violated for which a penalty is not prescribed?

If we return to § 6, the purchaser there is a purchaser with a permit, and a special penalty is provided for the violations of the terms of the permit in the second clause of § 29. The fact that the word "purchase" does not appear either in §§ 3 or 29 is clear and convincing evidence that Congress never intended to make the purchaser an offender.

There is no inconsistency or contradiction in the contention that Congress intended to punish purchasers who are required to have a permit, and not those who are not required to have a permit. The former class owes a legal duty to the Government for the privilege it holds; the latter owes no duty to the Government and runs the risk of prosecution for other offences. As the learned Judge in the court below put it: "There are strong reasons why permittees should be penalized for the abuse of the privileges granted them."

This Court is asked to write the word "purchase" into the first paragraph of § 3, or strike out the words "without a permit" in § 6. It must do one or the other to make the purchaser an offender. To borrow a phrase used by the late Mr. Justice Sanford in *Everard Breweries* v. *Day,* 265 U. S. 543, this would be "to pass the line which circumscribes the judicial department and to tread upon legislative ground."

United States. v. *Katz,* 271 U. S. 354, is decidedly analogous to the case at bar.

It is not admitted that there is any ambiguity here, but if there is, the character of the statute determines the construction, and a criminal statute is strictly construed, and the Court will so construe the statute as to carry out the intention of the legislature.

The records of Congress show that there was a proposal to insert the word "purchase" into the Eighteenth Amendment, and it was rejected by a vote of 62 to 4, 30 not voting. Cong. Rec., 65th Cong., 1st Sess., Vol. 55, Part 6, p. 5645.

It is to be presumed that Congress intended to keep within the scope of its constitutional authority, and not to go outside. *United States* v. *Standard Brewery,* 251 U. S. 220.

This Court may take judicial notice of Senate Bill 1827, introduced by the same Senator Sheppard, proponent of

the joint resolution which became the Eighteenth Amendment, September 30, 1929,—the Bill entitled "A Bill Amending the National Prohibition Act so as to Prohibit the Purchase of Intoxicating Liquors as a Beverage."

It has been uniformly held by prosecuting officers and the public at large for more than ten years, that the purchase of liquor was not an offence under the National Prohibition Act.

If the meaning of a statute is open to doubt, the contemporaneous construction placed upon it when it became operative, and acquiesced in by the executive, the legislature, and the courts, or those charged with its enforcement, is highly persuasive of what the law is.

As pointed out by the opinion of the court below, there are *dicta* from at least three circuits—*Beecher* v. *United States,* 5 F. (2d) 45; *Norris* v. *United States,* 34 F. (2d) 839; *Dickinson* v. *United States,* 18 F. (2d) 887—to the effect that a sale is not punishable under the National Prohibition Act.

Every textwriter upon the National Prohibition law for the last ten years has held that a purchaser is not guilty of any offence under it. McFadden on Prohibition, p. 294, § 267; Blakemore on Prohibition, p. 151; Thorpe, National and State Prohibition, p. 196; Nelson, Federal Liquor Laws, p. 326, § 1022; Wayne B. Wheeler, Federal & State Laws Relating to Intoxicating Liquor, 3d ed., p. 69.

Administrative necessity or supposed public policy cannot add to an Act of Congress and make conduct criminal which the law leaves untouched. *Sarlls* v. *United States,* 152 U. S. 570; *United States* v. *Standard Brewery,* 251 U. S. 210.

It is fundamental that a penal law must inform the potential criminal that the act he is about to do is punishable as a crime. *United States* v. *Wilterberger,* 5 Wheat. 96; *United States* v. *Reese,* 92 U. S. 214; *Ex parte Webb,* 225 U. S. 663.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

By indictment returned in the federal district court for Massachusetts, the defendant (appellee) was charged with unlawfully and knowingly having purchased intoxicating liquor fit for use for beverage purposes, in violation of the National Prohibition Act. The district court sustained a motion to quash the indictment on the ground that the ordinary purchaser of intoxicating liquor does not come within the purview of the act. 38 F. (2d) 515. The government appealed under the Criminal Appeals Act of March 2, 1907, c. 2564, 34 Stat. 1246; U. S. C., Title 18, § 682, and § 238 of the Judicial Code, as amended by the act of February 13, 1925, c. 229, 43 Stat. 936, 938; U. S. C., Title 28, § 345.

Section 3 of the Prohibition Act, c. 85, 41 Stat. 305, 308, makes it unlawful for any person to "manufacture, sell, barter, transport, import, export, deliver, furnish or possess any intoxicating liquor except as authorized in this Act . . ."; but provides that "Liquor for nonbeverage purposes and wine for sacramental purposes may be manufactured, purchased, sold . . . but only as herein provided, and the commissioner may, upon application, issue permits therefor: . . . ."

Section 6 of the act, 41 Stat. 310, provides: "No one shall manufacture, sell, purchase, transport, or prescribe any liquor without first obtaining a permit from the commissioner so to do, except that a person may, without a permit, purchase and use liquor for medicinal purposes when prescribed by a physician as herein provided . . ." Following this language, the section regulates with much detail the issue, character, and duration of the permit, and the application therefor, which application, among other things, must set forth "the qualification of the applicant and the purpose for which the liquor is to be used." The form of the permit and application, and the

facts to be set forth therein are to be prescribed by the Commissioner of Internal Revenue, who is to require a bond in such form and amount as he may prescribe to insure compliance with the terms of the permit and provisions of the act. A large part of the act, including § 6, is devoted to the subject of the authorized manufacture, sale, transportation, and use of intoxicating liquor for nonbeverage purposes; while § 3 plainly deals with the prohibited traffic in such liquors for beverage purposes.

The government relies upon the literal terms of § 6, that "No one shall . . . purchase . . . any liquor without first obtaining a permit from the commissioner so to do . . ."; but, at the same time, frankly concedes that the application of this language to the present case is not free from doubt. The contrary view is that these words, considered in connection with the other provisions of § 6 and correlated sections, relate only to that class of persons who lawfully may be authorized to sell, purchase, or otherwise deal with intoxicating liquors for nonbeverage purposes, and who proceed to do so without a permit. That this defendant does not belong to that class, and could not, under any circumstances, have obtained a permit to make a purchase of the character here made, is not in dispute. The question thus presented is very nearly the same as that decided in *United States* v. *Katz*, 271 U. S. 354; and in principle is concluded by that case.

There, the defendants were charged with conspiring to sell intoxicating liquors without making a permanent record of the sale, in violation of § 10 of the act. The indictments were quashed in the district court on the ground that § 10, which required a permanent record to be made of sales, applied only to persons authorized to sell alcoholic liquor, and that the indictment failed to allege that either of the defendants held a permit or was otherwise author-

ized to sell. This court, in affirming the judgment, said (pp. 361–362):

"Of the thirty-nine sections in Title II of the Act, which deals with national prohibition, more than half, including the seven sections which precede § 10, contain provisions authorizing or regulating the manufacture, sale, transportation or use of intoxicating liquor for nonbeverage purposes. These provisions, read together, clearly indicate a statutory plan or scheme to regulate the disposition of alcoholic liquor not prohibited by the Eighteenth Amendment, in such manner as to minimize the danger of its diversion from authorized or permitted uses to beverage purposes. These provisions plainly relate to those persons who are authorized to sell, transport, use or possess intoxicating liquors under the Eighteenth Amendment and the provision of § 3 of the Act, already quoted." *

And it was held (p. 363) that "the words 'no person' in § 10 refer to persons authorized under other provisions of the act to carry on traffic in alcoholic liquors," not to the ordinary violator of a provision prohibiting transactions in respect of liquors for beverage purposes.

It is not necessary to repeat the citation of authorities or the pertinent canons of statutory construction set forth in the opinion to support this conclusion. We are unable to find any logical ground for holding that the words "no person" in § 10 are used in the restricted sense thus stated, but that identical words in § 6, which forms a part of the same general plan for controlling the authorized traffic in intoxicating liquors, may be given an unlimited application. Obviously the National Prohibition Act deals with the liquor traffic from two different points of view. In the case of beverage liquors, except for sacramental and medicinal purposes, the traffic is prohibited

* This refers to the portion of § 3 relating to the manufacture, etc., of liquor for nonbeverage purposes and wine for sacramental purposes.

absolutely and unconditionally; in the case of nonbeverage liquors, it is permitted but carefully regulated. The prohibitions in § 3 are with respect to the former; while those in § 6 are with respect to the latter. In the former the sale, but not the purchase, is prohibited; in the latter both are prohibited.

Since long before the adoption of the Eighteenth Amendment it has been held with practical unanimity that, in the absence of an express statutory provision to the contrary, the purchaser of intoxicating liquor, the sale of which was prohibited, was guilty of no offense. And statutes to the contrary have been the rare exception. Probably it was thought more important to preserve the complete freedom of the purchaser to testify against the seller than to punish him for making the purchase. See *Lott* v. *United States,* 205 Fed. 28. However that may be, it is fair to assume that Congress, when it came to pass the Prohibition Act, knew this history and, acting in the light of it, deliberately and designedly omitted to impose upon the purchaser of liquor for beverage purposes any criminal liability. If aid were needed to support this view of the matter, it would be found in the fact, conceded by the government's brief, that during the entire life of the National Prohibition Act, a period of ten years, the executive departments charged with the administration and enforcement of the act have uniformly construed it as not including the purchaser in a case like the present; no prosecution until the present one has ever been undertaken upon a different theory; and Congress, of course well aware of this construction and practice, has significantly left the law in its original form. It follows that, since the indictment charges no offense under § 6, it was properly quashed.

Judgment affirmed.

JAMISON ET AL., EXECUTORS, *v.* ENCARNACION.

CERTIORARI TO THE SUPREME COURT OF NEW YORK.

No. 390. Argued April 22, 1930.—Decided May 26. 1930.

1. A stevedore employed in loading cargo on navigable waters is a seaman within the meaning of § 33 of the Merchant Marine Act, and his right of action for personal injuries suffered while so engaged is governed by the maritime law as modified by that Act and the Federal Employers' Liability Act. P. 639.
2. The term "negligence," as used in § 1 of the Federal Employers' Liability Act, includes an assault on one of a crew of workmen by a foreman authorized to direct them and keep them at work, where the purpose of the assault was to hurry the workman assaulted about work assigned him. *Id.*
3. The rule that statutes in derogation of the common law are to be strictly construed does not require such an adherence to the letter as would defeat an obvious legislative purpose or lessen the scope plainly intended to be given to the measure. P. 640.
4. The Federal Employers' Liability Act is to be construed liberally to fulfill the purposes for which it was enacted and to that end the word "negligence" may be read to include all the meanings given to it by courts and within the word as ordinarily used. *Id.*

251 N. Y. 218, affirmed.

CERTIORARI, 280 U. S. 545, to review a judgment of the Supreme Court of New York entered upon a remittitur from the Court of Appeals, which reversed a judgment of the Appellate Division, 224 App. Div. 260, and sustained a recovery in an action for negligence.

Mr. Theodore H. Lord, with whom *Messrs. James B. Henney* and *Daniel Miner* were on the brief, for petitioners.

In passing the Federal Employers' Liability Act, Congress knew that a large number of employees were injured by the negligence of co-employees, for which the common law provided no remedy, and that many were injured as a result of the risks of the work, and not because

of any negligence, which likewise were irremediable at common law. It chose to deal with the first class of injuries and not with the second. It adopted in a modified form the principle of industrial insurance by making the common carrier an insurer against loss from injuries due to the negligence of a fellow servant.

If the common law courts attempted to apply the principle of industrial insurance in master and servant cases, it would endanger all small business enterprises, as each master would be responsible for the entire loss resulting from the obligation of insuring employees against loss from injuries due to accidents arising out of and in the course of the employment.

The courts in applying the common law rules of master and servant should not be influenced by statutes which recognize the economic principle of industrial insurance.

All decisions of all other state and federal courts, including several in this Court, unanimously hold that liability under the Federal Employers' Liability Act depends upon proof of negligence.

The Act unmistakably bases the employers' liability on negligence and no words can be read into it by implication to extend it beyond its express meaning.

The courts may not read additional words into an unambiguous statute on the theory that Congress must have intended to make the statute cover the added subject. *Dewey* v. *United States,* 178 U. S. 510; *United States* v. *Chase,* 135 U. S. 255; *United States* v. *Goldberg,* 168 U. S. 95; *Newhall* v. *Sanger,* 92 U. S. 761.

International Stevedoring Co. v. *Haverty,* 272 U. S. 50, relied upon by the Court of Appeals does not sustain the ruling. *Gabrielson* v. *Waydell,* 67 Fed. 342, distinguished.

There is no evidence that the barge the longshoremen were loading was being used in connection with the loading or unloading of any vessel employing seamen, there-

fore, the respondent is not shown to have been engaged in seamen's work, and is not entitled to the benefits of the Federal Employers' Liability Act.

The fact that the tort was committed on navigable water, and therefore is subject to the federal jurisdiction over maritime matters, does not make the Jones Act applicable.

A stevedore merely as such, is not a seaman. It is only when he is performing seamen's work that he is so classified.

This Court has never held that an employer stevedore, because he is loading a vessel, is the master of the ship. The employer of the stevedore, not being the master of a ship, has no right to discipline his workmen by use of physical force. Having no right to use physical force, the law can not imply that he has delegated to the foreman authority to use force.

The law can not from the conventional relation of master and servant raise an implied delegation by the master to a foreman of authority to commit an unlawful, in fact, criminal act.

Therefore, although the maritime jurisdiction over the tort is established, the application of the Jones Act is not shown.

Mr. James A. Gray, with whom *Mr. William S. Butler* was on the brief, for respondent.

MR. JUSTICE BUTLER delivered the opinion of the Court.

This is an action brought in the Supreme Court of New York by respondent, a longshoreman, against William A. Jamison, an employing stevedore, to recover damages for personal injuries. Plaintiff was employed by defendant as a member of a crew loading a barge lying at Brooklyn in the navigable waters of the United States. One Curren was the foreman in charge of the crew. While plaintiff was upon the barge engaged with

others in loading it, the foreman struck and seriously injured him.

The evidence showed that the foreman was authorized by the employer to direct the crew and to keep them at work. Plaintiff's evidence was sufficient to warrant a finding that the foreman assaulted him without provocation and to hurry him about the work. The trial judge instructed the jury that the defendant would not be liable if the foreman assaulted plaintiff by reason of a personal difference, but that if the foreman, in the course of his employment, committed an unprovoked assault upon plaintiff in furtherance of defendant's work, plaintiff might recover. The jury returned a verdict for $2,500 in favor of plaintiff and the court gave him judgment for that amount.

The case was taken to the Appellate Division and there plaintiff invoked in support of the judgment § 33 of the Merchant Marine Act, 1920, 46 U. S. C., § 688, and the Federal Employers' Liability Act of April 22, 1908, 45 U. S. C., §§ 51–59. The court, 224 App. Div. 260, held that plaintiff's injury was not the result of any negligence within the meaning of the latter Act and reversed the judgment.

The Court of Appeals, 251 N. Y. 218, held that the Federal Employers' Liability Act applies and, after quoting the language of this court in *International Stevedoring Co.* v. *Haverty,* 272 U. S. 50, 52, said (p. 223): "As the word 'seamen' in the act [§ 33, Merchant Marine Act] includes 'stevedores,' so the word 'negligence' [§ 1, Federal Employers' Liability Act] should . . . include 'misconduct.'" It reversed the judgment of the Appellate Division and affirmed that of the Supreme Court.

Section 33 of the Merchant Marine Act provides:

"Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by

jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; . . ."

Section 1 of the Federal Employers' Liability Act provides:

"Every common carrier by railroad while engaging in [interstate] commerce . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, . . . for such injury . . . resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, . . ."

Plaintiff was a seaman within the meaning of § 33 (*International Stevedoring Co.* v. *Haverty, supra*) and, as he sustained the injuries complained of while loading a vessel in navigable waters, the case is governed by the maritime law as modified by the Acts of Congress above referred to. *Northern Coal Co.* v. *Strand,* 278 U. S. 142. *Panama R. R. Co.* v. *Johnson,* 264 U. S. 375. He is entitled to recover if within the meaning of § 1 his injuries resulted from the negligence of the foreman.

The question is whether "negligence" as there used includes the assault in question. The measure was adopted for the relief of a large class of persons employed in hazardous work in the service described. It abrogates the common law rule that makes every employee bear the risk of injury or death through the fault or negligence of fellow servants and applies the principle of respondeat superior (§ 1), eliminates the defense of contributory negligence and substitutes a rule of comparative negligence (§ 3), abolishes the defense of assumption of risk where the violation of a statute enacted for the safety of employees is a contributing cause (§ 4) and denounces all contracts, rules and regulations calculated to exempt the employer from liability created by the Act. § 5.

The reports of the House and Senate committees having the bill in charge condemn the fellow-servant rule as operating unjustly when applied to modern conditions in actions against carriers to recover damages for injury or death of their employees and show that a complete abrogation of that rule was intended.[1] The Act, like an earlier similar one that was held invalid because it included subjects beyond the reach of Congress,[2] is intended to stimulate carriers to greater diligence for the safety of their employees and of the persons and property of their patrons. *Second Employers' Liability Cases,* 223 U. S. 1, 51. *Minneapolis R. Co.* v. *Rock,* 279 U. S. 410, 413.

The rule that statutes in derogation of the common law are to be strictly construed does not require such an adherence to the letter as would defeat an obvious legislative purpose or lessen the scope plainly intended to be given to the measure. *Johnson* v. *Southern Pacific Co.,* 196 U. S. 1, 17–18. *Gooch* v. *Oregon Short Line R. R. Co.,* 258 U. S. 22, 24. *Barrett* v. *Van Pelt,* 268 U. S. 85, 90. *Johnson* v. *United States,* 163 Fed. 30, 32. Cf. *Hackfeld & Co.* v. *United States,* 197 U. S. 442, 449, *et seq.* The Act is not to be narrowed by refined reasoning or for the sake of giving "negligence" a technically restricted meaning. It is to be construed liberally to fulfill the purposes for which it was enacted and to that end the word may be read to include all the meanings given to it by courts and within the word as ordinarily used. *Miller* v. *Robertson,* 266 U. S. 243, 248, 250.

As the Federal Employers' Liability Act does not create liability without fault (*Seaboard Air Line* v. *Horton,* 233 U. S. 492, 501), it may reasonably be construed in contrast with proposals and enactments to make employers

[1] Senate Report No. 460, pp. 1–2, 60th Congress, 1st Session. House of Representatives Report No. 1386, p. 2, 60th Congress, 1st Session.

[2] Act of June 11, 1906, 34 Stat. 232, held unconstitutional in *The Employers' Liability Cases,* 207 U. S. 463.

liable, in the absence of any tortious act, for the payment of compensation for personal injuries or death of employees arising in the course of their employment.

"Negligence" is a word of broad significance and may not readily be defined with accuracy. Courts usually refrain from attempts comprehensively to state its meaning. While liability arises when one suffers injury as the result of any breach of duty owed him by another chargeable with knowledge of the probable result of his conduct, actionable negligence is often deemed—and we need not pause to consider whether rightly—to include other elements. Some courts call willful misconduct evincing intention or willingness to cause injury to another gross negligence. *Bolin* v. *Chicago, St. P., M. & O. Railway Co.*, 108 Wis. 333, and cases cited. And see *Peoria Bridge Association* v. *Loomis*, 20 Ill. 235, 251. *C., R. I. & P. Ry. Co.* v. *Hamler*, 215 Ill. 525, and cases cited. *Mercer* v. *Corbin*, 117 Ind. 450. And it has been held that the use of excessive force causing injury to an employee by the superintendent of a factory in order to induce her to remain at work was not a trespass as distinguished from a careless or negligent act. *Richard* v. *Amoskeag Mfg. Co.* 79 N. H. 380, 381. While the assault of which plaintiff complains was in excess of the authority conferred by the employer upon the foreman, it was committed in the course of the discharge of his duties and in furtherance of the work of the employer's business. As unquestionably the employer would be liable if plaintiff's injuries had been caused by mere inadvertence or carelessness on the part of the offending foreman, it would be unreasonable and in conflict with the purpose of Congress to hold that the assault, a much graver breach of duty, was not negligence within the meaning of the Act. *Johnson* v. *Southern Pacific Co., supra. Schlemmer* v. *Buffalo, R. & P. Ry.*, 205 U. S. 1, 9, 10.

Judgment affirmed.

ALPHA STEAMSHIP CORPORATION ET AL. *v.* CAIN.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 457. Argued April 29, 30, 1930.—Decided May 26, 1930.

An assault on a seaman by a superior authorized to direct his work and who committed the assault for the purpose of reprimanding him for tardiness and compelling him to work, *held,* negligence of the employer within the meaning of the Federal Employers' Liability Act, and actionable against the employer under that Act as made applicable by the Merchant Marine Act. *Jamison* v. *Encarnacion, ante,* p. 635.

35 F. (2d) 717, affirmed.

CERTIORARI, 280 U. S. 549, to review a judgment of the Circuit Court of Appeals affirming a recovery by a seaman for injuries resulting from an assault committed upon him by a superior aboard ship.

Mr. Carver W. Wolfe for petitioners.

Mr. Vine H. Smith, with whom *Messrs. Thomas J. Cuff, Milton Pinkus,* and *Dix W. Noel* were on the brief, for respondent.

MR. JUSTICE BUTLER delivered the opinion of the Court.

Respondent was a seaman employed as a fireman on the American steamship Alpha navigating the high seas. The corporation petitioner owned and operated the vessel and the other petitioners were in possession of her. Respondent sued petitioners in the federal court for the Southern District of New York to recover damages for personal injuries caused by an assault upon him by his superior, one Jackson, an assistant engineer in charge of the engine room. The complaint charged and the evidence was sufficient to warrant a finding that Jackson was authorized by defendants to direct plaintiff about his

work and that, for the purpose of reprimanding him for tardiness and compelling him to work, Jackson struck plaintiff with a wrench and seriously injured him. That was the basis of fact upon which the jury under the charge of the court was authorized to find for plaintiff. The jury returned a verdict in favor of plaintiff for $12,000 and the judgment thereon was affirmed in the Circuit Court of Appeals.

That court expressed the opinion, 35 F. (2d) 717, 721, that § 33 of the Merchant Marine Act, 46 U. S. C., § 688, and the Federal Employers' Liability Act, 45 U. S. C., §§ 51-59, did not apply and held defendants liable under the general maritime law without regard to these Acts. But in *Jamison* v. *Encarnacion,* decided this day, *ante,* p. 635, we hold that such an assault is negligence within the meaning of § 1 of the Federal Employers' Liability Act which is made available to seamen by § 33 of the Merchant Marine Act. The ruling in that case controls in this. We need not examine the grounds upon which the Circuit Court of Appeals put its decision.

Judgment affirmed.

TOOMBS *v.* CITIZENS BANK OF WAYNESBORO.

APPEAL FROM THE SUPREME COURT OF GEORGIA.

No. 485. Submitted April 28, 1930.—Decided May 26, 1930.

1. A Georgia statute provides that, upon being required by the Superintendent of Banks to make good an impairment of capital by an assessment upon stockholders, the officers and directors of a bank shall call a special meeting of the stockholders for the purpose of making such assessment. In a case from the state court in which a stockholder challenged an assessment, under the due process clause of the Fourteenth Amendment, *held* that, in the absence of a controlling decision by the state court, it can not be assumed either that notice of the stockholders' meeting at which

the assessment was made was not required by the state law, or that a notice actually given by mailing it fifteen days before the meeting, addressed to the stockholder at his address last known to the bank, was insufficient. P. 646.

2. In assailing the constitutionality of a state statute the burden rests upon the complainant to establish that it infringes the constitutional guarantee which he invokes. If the state court has not otherwise construed it, and it is susceptible of an interpretation which conforms to constitutional requirements, doubts must be resolved in favor of the State. P. 647.

169 Ga. 115, affirmed.

APPEAL from a judgment sustaining a recovery by the Bank in an action to collect an assessment from a stockholder.

Mr. W. A. Slaton was on the brief for appellant.

Messrs. Carl N. Davie and *Earl Norman* were on the brief for appellee.

MR. JUSTICE STONE delivered the opinion of the Court.

This is an appeal from a judgment of the Supreme Court of Georgia, upholding the constitutionality of the provisions of the Georgia statutes regulating the assessment, by corporate action, of shareholders of state banking institutions whose capital has become impaired. 169 Ga. 115. Section 1 of Art. VI, Georgia Banking Law, Act of August 26th, Ga. Laws, 1925, p. 126, amending Art. VI, Ga. Laws, 1919, p. 135; Ga. Civil Code, § 2366, (48), (49). Section 1 (printed in the margin [1]) provides that when the capital of a state bank is impaired the Superintendent

[1] "Section 1. Assessment of stockholders.

"Whenever the Superintendent of Banks shall find that the capital stock of any bank has become impaired or reduced as much as ten per cent. of its par value from losses or any other causes, the Superintendent of Banks shall notify and require such bank to make good its capital stock so impaired or reduced within sixty (60) days, by

shall require the bank to make good the impairment by assessment upon the stockholders, and that "it shall be the duty of the officers and directors of the bank receiving such notice to immediately call a special meeting of the stockholders for the purpose of making an assessment on its stockholders sufficient to cover the impairment." Section 2 authorizes the bank, in addition to other remedies, to bring suit against stockholders for the amount of the assessment. The Supreme Court of the state, construing the statute, has held that an assessment under the provisions of § 1 (formerly in § 2 of Art. VI of the Georgia Banking Law, Ga. Laws 1919, p. 135) is a voluntary act on the part of the stockholders, who may, at their election, by action taken at the stockholders meeting, levy the assessment, or decline to levy it and permit the liquidation of the bank by the Superintendent of Banks, who may levy an assessment under another provision of the statute not now involved. *Smith* v. *Mobley,* 166 Ga. 195. Arts. VI and VII of the Georgia Banking Law; Ga. Laws, 1919, p. 135.

Petitioner is the owner of shares of capital stock of the Citizens Bank of Waynesboro, chartered under the Georgia statutes January 1st, 1920. On August 16, 1926, the bank became insolvent and passed into the control of the State Superintendent of Banks, who found that the

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an assessment upon the stockholders thereof, and it shall be the duty of the officers and directors of the bank receiving such notice to immediately call a special meeting of the stockholders for the purpose of making an assessment upon its stockholders sufficient to cover the impairment of the capital payable in cash, at which meeting such assessment shall be made, provided that such bank may reduce its capital to the extent of the impairment if such reduction will not place its capital below the amount required by this Act. At any such special meeting of the stockholders a majority of the stock outstanding at the time shall be deemed a quorum, and such assessment may be made upon a majority vote of the quorum present."

net indebtedness of the bank exceeded its capital. Certain depositors of the bank having undertaken to release their claims so that its indebtedness would equal its capital, the Superintendent of Banks agreed to surrender his control of the bank if its stockholders would authorize a levy of an assessment of 100% of the par value of the stock. A stockholders meeting, held October 22, 1926, at which a majority of the shares was represented, adopted resolutions assessing the stock accordingly.

The present suit to recover the assessment upon appellant's shares was brought in the Superior Court of Wilkes County, and its judgment in favor of the respondent was affirmed by the state Supreme Court. Appellant, by his pleadings, challenged the constitutionality of the statute upon the ground, relied on here, that § 1, by its failure to provide for notice to stockholders of the special meeting for the purpose of levying the assessment, denies due process of law guaranteed by the Fourteenth Amendment.

Petitioner thus seeks to raise the question whether one who acquires stock in a corporation, notice of whose meetings is dispensed with by state law, can, for that reason alone, invoke the due process clause to set aside corporate action adversely affecting his interest as a stockholder.

But no such question is presented. Section 1 makes it the duty of the officers and directors of the bank, in the contingencies named, to "call a special meeting of the stockholders for the purpose of making an assessment." The statute does not prescribe that the meeting be called without notice. Petitioner points to no provision of the Georgia statutes or of the charter or by-laws of the bank dispensing with notice, nor to any decision of the Supreme Court holding that the statutory duty to "call" a stockholders meeting can be performed without reasonable notice to stockholders of the time and place of meeting. Even when there is no provision, in statute or by-laws, for notice, it has been held that common law principles re-

quire corporate meetings to be called by reasonable notice to stockholders. See *Stow* v. *Wyse,* 7 Conn. 214; *Wiggin* v. *First Freewill Baptist Church,* 8 Metc. (Mass.) 301, 312; *Stevens* v. *Eden Meeting-House Society,* 12 Vt. 688, 689. That, we think, in the absence of a controlling decision of the highest court of Georgia, must be taken to be the implied requirement of § 1.

Notice was in fact given in the present case, as appears by the agreed statement of facts by mailing it fifteen days before the meeting, addressed to petitioner at his address last known to the bank. It does not appear whether he received the notice. In the face of this record, we cannot assume either that notice was not required by the law of the state or that that actually given was insufficient.

In assailing the constitutionality of a state statute the burden rests upon appellant to establish that it infringes the constitutional guarantee which he invokes. If the state court has not otherwise construed it and it is susceptible of an interpretation which conforms to constitutional requirements, doubts must be resolved in favor of, and not against the state. See *Corporation Commission of Oklahoma, etc.* v. *Lowe, etc., ante,* p. 431; *South Utah Mines* v. *Beaver County,* 262 U. S. 325, 331.

Affirmed.

SURPLUS TRADING COMPANY *v.* COOK, SHERIFF.

ERROR TO THE SUPREME COURT OF ARKANSAS.

No. 2. Argued November 21, 1928.—Decided June 2, 1930.

Under Art. I, § 8, cl. 17, of the Constitution, land purchased by the United States for an Army station, with the consent of the legislature of the State in which it lies, comes under the exclusive jurisdiction of the United States, and private personal property there situate can not be taxed by the State. P. 649.

174 Ark. 507, reversed.

ERROR to a judgment of the Supreme Court of Arkansas sustaining a tax on personal property located on a federal military reservation.

Mr. Charles D. Cherry argued the cause, and *Messrs. G. B. Rose, D. H. Cantrell, J. F. Loughborough, A. W. Dobyns,* and *A. F. House* were on the brief, for plaintiff in error.

Mr. Sam T. Poe, with whom *Messrs. H. W. Applegate,* Attorney General of Arkansas, and *Tom Poe* were on the brief, for defendant in error.

The land in question was not acquired by the United States in the manner contemplated by § 8, Art. I, cl. 17 of the Constitution. *Ft. Leavenworth R. Co.* v. *Lowe,* 114 U. S. 525. Therefore jurisdiction of the United States over the reservation depends upon provisions of the cession Act of Arkansas. *Palmer* v. *Barrett,* 162 U. S. 399. That Act impliedly reserved the right to tax privately owned personal property on the military reservation.

The land was not actually purchased by the United States, but was donated by public-spirited citizens of Arkansas. "Purchase," as used in the Constitution, means only acquisition by actual purchase. *Ft. Leavenworth R. Co.* v. *Lowe,* 114 U. S. 525.

Although the agreed statement of facts speaks of the acquisition as by "purchase," this must be construed in the light of the legislation of Congress, which shows no money was appropriated or paid. Stipulation as to an alleged fact will not be construed so as to allow one to escape taxation when the legislation of Congress shows the fact did not exist. *Utah & N. Ry. Co.* v. *Fisher,* 116 U. S. 28.

Tax exemptions are never lightly to be inferred. *Heiner* v. *Colonial Trust Co.,* 275 U. S. 232. A State

may tax personal property situated on a government reservation within its limits and not belonging to the United States or otherwise exempt. *Thomas* v. *Gay,* 169 U. S. 264; *Wagoner* v. *Evans,* 170 U. S. 588; *Foster* v. *Pryor,* 189 U. S. 325; *Montana Catholic Missions* v. *Missoula County,* 200 U. S. 118; *Cassels* v. *Wilder,* 23 Haw. 61; *Rice* v. *Hammonds,* 19 Okla. 419; *County of Cherry* v. *Thacher,* 32 Neb. 350; *Nikis* v. *Commonwealth,* 144 Va. 618; *Cosier* v. *McMillan,* 22 Mont. 484; *Noble* v. *Amoretti,* 11 Wyo. 230; *Oscar Daniels Co.* v. *Sault Ste. Marie,* 208 Mich. 363; *Ex parte Gaines,* 56 Ark. 227.

Mr. Justice Van Devanter delivered the opinion of the Court.

This was a suit by the sheriff and collector of taxes of Pulaski County, Arkansas, to enforce payment by the Surplus Trading Company of taxes for the years 1922 and 1923, with penalties, upon certain personal property. The chancery court, in which the suit was brought, gave a decree for the defendant, and on appeal the Supreme Court of the State affirmed the decree as to the tax for 1923 and reversed it as to the tax for 1922 with a direction that a decree be entered for the plaintiff for the amount of that tax and the penalty, both of which were specified in the record, 174 Ark. 507.

The defendant resisted the collection of the tax for 1922 on the ground that the personal property on which it was laid was located within Camp Pike—an army mobilization, training and supply station of the United States lying within the exterior limits of Pulaski County—the lands in which had been purchased by the United States, with the consent of the legislature of the State, for the purpose of establishing, erecting and maintaining such an army station; and that the tax laws of the State could not be applied to property so located

without bringing them, in that regard, into conflict with Article I, § 8, cl. 17 of the Constitution of the United States, which prescribes that the Congress shall have power—

"To exercise exclusive legislation in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession of particular States, and the acceptance of Congress, become the seat of the government of the United States, and to exercise like authority over all places purchased by the consent of the legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings; . . ."

The property attempted to be taxed consisted of a large quantity of woolen blankets which the defendant, a New York concern, purchased from the United States at an advertised sale a few days before the day fixed by the state law for listing personal property for taxation, and which in much the greater part was on that day in the army storehouses within Camp Pike awaiting shipment therefrom.

The Supreme Court of the State, although recognizing that the status of Camp Pike was as just stated and that the property on which the tax was laid was in much the greater part located therein, rejected the contention that the tax laws of the State could not be applied to property so located consistently with the constitutional provision cited.

It is not unusual for the United States to own within a State lands which are set apart and used for public purposes. Such ownership and use without more do not withdraw the lands from the jurisdiction of the State. On the contrary, the lands remain part of her territory and within the operation of her laws, save that the latter cannot affect the title of the United States or embarrass it in using the lands or interfere with its right of disposal.

A typical illustration is found in the usual Indian reservation set apart within a State as a place where the United States may care for its Indian wards and lead them into habits and ways of civilized life. Such reservations are part of the State within which they lie and her laws, civil and criminal, have the same force therein as elsewhere within her limits, save that they can have only restricted application to the Indian wards. Private property within such a reservation, if not belonging to such Indians, is subject to taxation under the laws of the State. Another illustration is found in two classes of military reservations within a State—one where the reservation, although established before the State is admitted into the Union, is not excepted from her jurisdiction at the time of her admission; and the other where the reservation, although established after the admission of the State, is established either upon lands set apart by the United States from its public domain or upon lands purchased by it for the purpose without the consent of the legislature of the State. In either case, unless there be a later and affirmative cession of jurisdiction by the State, the reservation is a part of her territory and within the field of operation of her laws, save that they can have no operation which would impair the effective use of the reservation for the purposes for which it is maintained. If there be private property within such a reservation which is not held or used as an incident of military service it may be subjected to taxation like other private property within the State.

As respects such a military reservation—that is, one which is neither excepted from the jurisdiction of the State at the time of her admission nor established upon lands purchased therefor with the consent of her legislature—the State undoubtedly may cede her jurisdiction to the United States and may make the cession either absolute or qualified as to her may appear desirable, provided the qualification is consistent with the purposes

for which the reservation is maintained and is accepted by the United States. And where such a cession is made and accepted it will be determinative of the jurisdiction of both the United States and the State within the reservation.

But Camp Pike is not in the same class with any of the reservations of which we have spoken and should not be confused with any of them. Nor should it be confused with military or other reservations within a Territory of the United States. It is not questioned, nor could it well be, that Camp Pike comes within the words "forts, magazines, arsenals, dock-yards, and other needful buildings" in the constitutional provision. The land therefor was purchased by the United States with the consent of the legislature of the State in 1917. The constitutional provision says that Congress shall have power to exercise "exclusive legislation in all cases whatsoever" over a place so purchased for such a purpose. "Exclusive legislation" is consistent only with exclusive jurisdiction. It can have no other meaning as to the seat of government, and what it means as to that it also means as to forts, magazines, arsenals, dock-yards, etc. That no divided jurisdiction respecting the seat of government is intended is not only shown by the terms employed but is a matter of public history. Why as to forts, magazines, arsenals, dock-yards, etc., is the power given made to depend on purchase with the consent of the legislature of the State if the jurisdiction of the United States is not to be exclusive and that of the State excluded?

The question is not an open one. It long has been settled that where lands for such a purpose are purchased by the United States with the consent of the state legislature the jurisdiction theretofore residing in the State passes, in virtue of the constitutional provision, to the United States, thereby making the jurisdiction of the latter the sole jurisdiction.

The first reported decision on the question is *Commonwealth* v. *Clary,* 8 Mass. 72. The question there was whether the law of Massachusetts restricting the sale of intoxicating liquors to persons procuring and paying for licenses could be applied to an arsenal of the United States in Springfield, the land for which had been purchased with the consent of the Commonwealth. The court held that the license law could not be so applied and in that connection said, p. 77:

"An objection occurred to the minds of some members of the court, that if the laws of the commonwealth have no force within this territory, the inhabitants thereof cannot exercise any civil or political privileges, under the laws of Massachusetts, within the town of Springfield. We are agreed that such consequence necessarily follows; and we think that no hardship is thereby imposed on those inhabitants;—because they are not interested in any elections made within the state, not held to pay any taxes imposed by its authority, nor bound by any of its laws. And it might be very inconvenient to the United States, to have their labourers, artificers, officers and other persons employed in their service, subjected to the services required by the commonwealth of the inhabitants of the several towns."

In *Mitchell* v. *Tibbetts,* 17 Pick. 298, the question was whether a law of Massachusetts relating to vessels bringing stone within that Commonwealth could be applied to a vessel landing stone at the Charlestown Navy Yard, the land for which had been purchased by the United States with the consent of the Commonwealth. The court ruled that the law could not be so applied because the Commonwealth no longer had any jurisdiction over the navy yard.

In *United States* v. *Cornell,* Fed. Case No. 14,867, Mr. Justice Story, at circuit, held that a state consenting to the purchase by the United States of land for a fort was

without jurisdiction of a public offense subsequently committed therein, and he stated his reasons as follows:

"The constitution of the United States declares that congress shall have power to exercise 'exclusive legislation' in all 'cases whatsoever' over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dockyards and other needful buildings. When therefore a purchase of land for any of these purposes is made by the national government, and the state legislature has given its consent to the purchase, the land so purchased by the very terms of the constitution ipso facto falls within the exclusive legislation of congress, and the state jurisdiction is completely ousted. This is the necessary result, for exclusive jurisdiction is the attendant upon exclusive legislation; and the consent of the state legislature is by the very terms of the constitution, by which all the states are bound, and to which all are parties, a virtual surrender and cession of its sovereignty over the place. Nor is there anything novel in this construction. It is under the like terms in the same clause of the constitution that exclusive jurisdiction is now exercised by congress in the District of Columbia; for if exclusive jurisdiction and exclusive legislation do not import the same thing, the states could not cede or the United States accept for the purposes enumerated in this clause, any exclusive jurisdiction."

Of like import is the opinion of Mr. Justice Woodbury given at circuit in *United States* v. *Ames,* Fed. Cas. No. 14,441.

In *Sinks* v. *Reese,* 19 Ohio St. 306, which related to lands purchased with the consent of the legislature of Ohio for a national home for disabled volunteer soldiers, a question arose respecting the effect of a proviso in the act of consent declaring that nothing in the act should be construed to prevent residents of the home from exer-

cising the right of suffrage within the township in which the home was located. The Supreme Court of the State held that through the purchase of the site for the home with the consent of the state legislature the United States acquired exclusive jurisdiction over the site and that the residents of the home, being within that exclusive jurisdiction, were not residents of the State and therefore not entitled to vote therein.

In *Foley* v. *Shriver,* 81 Va. 568, it was held of lands within the State of Virginia purchased with her consent for another national home for disabled volunteer soldiers, that in virtue of the constitutional provision the purchase invested the United States with complete jurisdiction of the lands to the exclusion of the State, so that they were "no longer a part of the State of Virginia." And there was a like ruling in *Bank of Phoebus* v. *Byrum,* 110 Va. 708.

In *State* v. *Mack,* 23 Nev. 359, which related to a purchase by the United States with the state's consent of land for a post office and federal court building, it was held, notwithstanding a provision in the act of consent purporting to "except the administration of the criminal laws of the State," that the purchase operated under the constitutional provision to pass full jurisdiction over the land to the United States and to divest the State of all jurisdiction thereover, criminal as well as civil.

Like views of the operation of the constitutional provision are stated by Chancellor Kent in his Commentaries, Vol. 1, pp. *429–431; and by Judge Story in his work on the Constitution, 5th Ed., Vol. 2, §§ 1224–1227.

In *Fort Leavenworth R. R. Co.* v. *Lowe,* 114 U. S. 525, this Court said, p. 532:

"When the title is acquired by purchase by consent of the Legislatures of the States, the federal jurisdiction is exclusive of all State authority. This follows from the declaration of the Constitution that Congress shall have

'like authority' over such places as it has over the district which is the seat of government; that is, the power of 'exclusive legislation in all cases whatsoever.' Broader or clearer language could not be used to exclude all other authority than that of Congress."

And after reviewing some of the earlier cases here cited the Court further said, p. 537:

"These authorities are sufficient to support the proposition which follows naturally from the language of the Constitution, that no other legislative power than that of Congress can be exercised over lands within a State purchased by the United States with her consent for one of the purposes designated; and that such consent under the Constitution operates to exclude all other legislative authority."

And the view thus expressed was given approving recognition in our recent decision in *United States* v. *Unzeuta, ante*, p. 138, where it is said that, where the United States purchases lands by the consent of the legislature of the State within which they are situated for the purposes named in the constitutional provision, "the federal jurisdiction is exclusive of all state authority."

Apparently some of the cases to which we have referred were not brought to the attention of the Supreme Court of Arkansas. In its opinion it appears to have been guided largely by cases dealing with reservations in Territories and with reservations in States of lands which were not purchased by the United States with the consent of the States. Such cases are not in point, for they do not turn on the constitutional provision which is of controlling influence in cases like this. Another matter to which that court attached some importance is that the act by which the legislature consented to the purchase of the site for Camp Pike declares that the State "releases and relinquishes her right to tax" the lands and improvements during the ownership of the United States. Ark.

Laws 1903, Act 180. These words of release it is argued disclose a purpose to reserve the power to tax, save as to the lands and improvements. But to this we do not assent. The words are ill-adapted to expressing such a purpose—so much so that, had it existed, there can be little doubt that it would have been stated differently. Not only so, but to construe the release as suggested would lead to a serious question respecting the validity of the release and would bring it into conflict with the preceding section, which directly states that the State "hereby consents to the purchase" of the site, and "the jurisdiction of this State within and over" the site "is hereby ceded" to the United States. The release is not in form or substance a proviso but is an affirmative provision inserted as an independent section and we think it means what it says and no more. That the legislature understood how to use a saving clause or proviso is evident from the following which appears at the end of the first section: "Provided, that this grant of jurisdiction shall not prevent execution of any process of this State, civil or criminal, upon any person who may be on said premises." Such a proviso is common to nearly all acts giving consent to purchase, and is regarded, says Chancellor Kent, as amounting, when accepted, to "an agreement of the new sovereign to permit the free exercise of such process, as being quoad hoc his own process." Kent's Commentaries, Vol. 1, p. *430.

For the reasons which have been stated we are of opinion that the Supreme Court of the State erred in holding that her tax laws could be applied to personal property within Camp Pike consistently with § 8, cl. 17, of Article I of the Constitution, and therefore that the judgment of that court must be reversed.

But to avoid any misapprehension it is well to state that our ruling is limited to the blankets which were within Camp Pike on May 1, 1922, the day fixed for

listing personal property for assessment. We are led to make this statement because the record suggests, if it does not show, that on that day 21,235 of the blankets purchased by the plaintiff were held by it in a private warehouse in Little Rock, the county seat of Pulaski County, and 64,371 was the number remaining in the government storehouses at Camp Pike. Whether the assessment which was on the whole can be proportionally sustained as to the part in Little Rock so that the plaintiff will be charged with only such portion of the tax as pertains to that part of the blankets is a question of state law on which we intimate no opinion.

The judgment will be reversed and the case remanded for further proceedings not inconsistent with this opinion.

Judgment reversed.

ANN ARBOR RAILROAD COMPANY ET AL. *v.* UNITED STATES ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

No. 7. Argued February 25, 1929. Reargued October 21, 22, 1929.—Decided June 2, 1930.

1. The Joint Resolution of January 20, 1925, known as the Hoch-Smith Resolution, declares it to be the true policy in rate-making that the conditions which at any given time prevail in the several industries should be considered, in so far as it is legally possible to do so; directs the Interstate Commerce Commission to proceed along stated lines for the purpose of securing prompt observance of existing laws requiring that all rates be just and reasonable and prohibiting all undue preferences and unjust discriminations, whether relating to shippers, commodities, classes of traffic, or localities; declares that, in the adjustment of rates, the factors to be considered shall include (a) the general and comparative levels in market value of the various classes and kinds of commodities as indicated over a reasonable period of years, (b) a natural

and proper development of the country as a whole, and (c) the maintenance of an adequate system of transportation; and directs that, in view of existing depression in agriculture, the Commission shall effect such "lawful changes" in the rate structure of the country as will promote free movement of agricultural products "at the lowest possible lawful rates compatible with the maintenance of adequate transportation service." *Held:*

(1) That the Resolution introduced no new factor in the fixing and adjustment of rates and requires no change in rates that are reasonable and lawful under §§ 1 (5) and 3 (1) of the Interstate Commerce Act. P. 666.

(2) A construction of the Resolution by the Commission whereby it operates as a change "in the basic law," as placing agricultural products in a "most favored" class, and as justifying a reduction in the rates on deciduous fruits moving from California to eastern points, notwithstanding that the rates are otherwise lawful and reasonable and that most of the carriers affected "have not as yet made the fair return" for which § 15a of the Interstate Commerce Act makes provision as a means of securing the maintenance of an adequate transportation system, is therefore erroneous. P. 667.

(3) The words "at the lowest possible lawful rates compatible with the maintenance of adequate transportation service," are more in the nature of a hopeful characterization of an object deemed desirable if, and in so far as, it may be attainable, than of a rule intended to control rate-making, and should not lightly be accepted as overturning positive and unambiguous provisions constituting part of a system of laws reflecting a settled legislative policy, such as the Interstate Commerce Act. P. 668.

2. Where the words of a statute are susceptible of various meanings, that construction should be avoided which would bring into question the constitutionality of the statute. P. 669.

Reversed. See also 30 F. (2d) 940.

APPEAL from a decree of the District Court of three judges under U. S. C., Title 28, § 47, dismissing the bill in a suit to set aside an order of the Interstate Commerce Commission condemning existing rates for the transportation of deciduous fruits from California to eastern destinations. See 129 I. C. C. 25; 132 *id.* 582.

Mr. Herman Phleger, with whom *Messrs. Maurice E. Harrison, James S. Moore, Jr., Platt Kent, James E. Lyons, Elmer Westlake, R. S. Outlaw, M. B. Pierce, F. D. McKenney, Clyde Brown, P. F. Gault, J. N. Davis, A. B. Enoch, Kenneth F. Burgess, Elmer A. Smith, F. M. Angellotti, E. W. Camp, A. S. Halsted,* and *Guy V. Shoup* were on the brief, for appellants.

Solicitor General Hughes, with whom *Messrs. J. Stanley Payne,* Assistant Chief Counsel, Interstate Commerce Commission, *Daniel W. Knowlton,* Chief Counsel, and *George C. Butte,* Special Assistant to the Attorney General, were on the brief, for the United States et al., on the reargument.

The Act requires that all rates shall be just and reasonable and reposes authority in the Commission to determine and prescribe rates which meet that standard. § 1 (5); § 15 (1). But since it is impossible to determine with accuracy what rates are just and reasonable, that question is left to the judgment and discretion of the Commission. *Interstate Commerce Comm.* v. *Union Pacific R. Co.,* 222 U. S. 541. Its judgment is to be formed from the evidence; and its conclusion is accepted as final when its action is not arbitrary or otherwise unlawful.

In other cases this Court has recognized the zone of reasonableness and the wide range of discretion in the exercise of the power to prescribe reasonable rates. *United States* v. *Illinois Central R. Co.,* 263 U. S. 515; *American Express Co.* v. *Caldwell,* 244 U. S. 617; *Northern Pac. R. Co.* v. *North Dakota,* 236 U. S. 585; *Norfolk & Western Ry.* v. *West Virginia,* 236 U. S. 605.

The broad discretion of the Commission in fixing rates is, of course, within the control of Congress. Section 15a is a prominent example of such congressional control.

Likewise, the Hoch-Smith Resolution controls the Commission's discretion to the extent that the Resolution

directs "the lowest possible lawful rates compatible with the maintenance of adequate transportation service." The direction of the Resolution is evidently, like that of § 15a, to be carried out by the Commission in the exercise of its power to prescribe just and reasonable rates.

The Resolution, indeed, sets no new standard of lawfulness, since it did not contemplate that any rate should be fixed under it which would not have been a lawful rate under prior law. But it recognizes that the fixation of any particular rate within the zone of lawfulness depends upon the relative weight which the Commission might give to the various factors which are normally considered in rate-making. The Resolution recognizes, both as a legal and a factual possibility, that there may be a lowest possible lawful rate, and, conversely and necessarily, a highest possible lawful rate. Such relative weight is to be given factors entering into determination of a reasonable rate as will produce the lowest possible lawful rate compatible with the maintenance of adequate transportation service. By the Resolution the Commission is directed to prescribe rates on a level at which prior to the Resolution the Commission would have been justified in fixing them, though not obliged to fix them.

The principle of rate-making that consideration should be given to the value of the commodity and what the traffic will bear, finds ample recognition in decisions of the courts as well as of the Commission. *Kansas City Sou. Ry.* v. *Carl,* 227 U. S. 639; *Imperial Coal Co.* v. *P. & L. E. R. Co.,* 2 I. C. C. 618. The underlying theory was clearly stated in *Investigation and Suspension Docket 26,* 22 I. C. C. 604.

If the Commission correctly construed the Resolution as stating an additional test in accordance with which it should exercise its discretion in determining whether an existing rate on agricultural products should be reduced,

it was warranted in finding that any rate which did not accord with that test was unreasonable and in setting it aside.

We submit that the Commission's finding that the rate here assailed was unreasonable, whether that finding be deemed to have been made under §1 of the Act alone or under the Act as supplemented by the Hoch-Smith Resolution, is entitled to the same sanction of conclusiveness as would have been a finding of unreasonableness in a non-agricultural case under the law as it existed prior to the Resolution. *Louisville & N. R. Co.* v. *Garrett,* 231 U. S. 298.

The Commission properly construed the Resolution as applicable to particular cases involving agricultural products.

The Resolution does not contemplate confiscatory rates and is not otherwise violative of the Fifth Amendment. It is a valid exercise of the power to regulate commerce. It is not an attempted regulation of industry, and does not grant "bounties," "special privileges," or "subsidies."

Mr. Allan P. Matthew, with whom *Messrs. J. M. Mannon, Jr., John F. Cassell, John O. Moran,* and *J. Richard Townsend* were on the brief, for the California Growers' and Shippers' Protective League, intervener and appellee.

Mr. Justice Van Devanter delivered the opinion of the Court.

This is a suit to set aside an order of the Interstate Commerce Commission condemning existing rates for the transportation of deciduous fruits from California to eastern destinations—chiefly points between the Mississippi River and the Atlantic seaboard. A hearing in the District Court before three judges under § 47, Title 28, U. S. C., resulted in a decree dismissing the bill; and a direct appeal has brought the case here.

The proceeding which resulted in the order was instituted before the commission December 27, 1926, by the California Growers' and Shippers' Protective League through a complaint assailing the existing rates as unjust and unreasonable under § 1 of the Interstate Commerce Act, unduly and unreasonably preferential under § 3 of that act, and having an unjust and unreasonable basis and being too high within the meaning of the joint resolution of Congress of January 30, 1925, known as the Hoch-Smith Resolution. The order was made July 20, 1927, and was changed by the commission in some particulars November 14 of that year. Originally it was to be effective October 10, 1927, but the Commission extended the time to January 10, 1928.

The plaintiffs in the suit are the railroad companies which participate in the transportation. In their bill and on this appeal they challenge the validity of the order upon the ground, among others, that the Commission based it upon the joint resolution and a construction thereof which is inadmissible.

The Interstate Commerce Act, Title 49, U. S. C., provides in §§ 1, 3 and 15 —

Sec. 1, par. (5) "All charges . . . shall be just and reasonable, and every unjust and unreasonable charge . . . is prohibited and declared to be unlawful: . . . ."

Sec. 3, par. (1) " It shall be unlawful . . . to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

Sec. 15, par. (1) " Whenever, after full hearing, upon a complaint . . . or . . . under an order for investigation and hearing made by the commission on its own

initiative, . . . the commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever . . . is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, . . . the commission is authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case . . . ."

The joint resolution, c. 120, 43 Stat. 801, reads:

"That it is hereby declared to be the true policy in rate making to be pursued by the Interstate Commerce Commission in adjusting freight rates, that the conditions which at any given time prevail in our several industries should be considered in so far as it is legally possible to do so, to the end that commodities may freely move.

"That the Interstate Commerce Commission is authorized and directed to make a thorough investigation of the rate structure of common carriers subject to the interstate commerce act, in order to determine to what extent and in what manner existing rates and charges may be unjust, unreasonable, unjustly discriminatory, or unduly preferential, thereby imposing undue burdens, or giving undue advantage as between the various localities and parts of the country, the various classes of traffic, and the various classes and kinds of commodities, and to make, in accordance with law, such changes, adjustments, and redistribution of rates and charges as may be found necessary to correct any defects so found to exist. In making any such change, adjustment, or redistribution the commission shall give due regard, among other factors, to the general and comparative levels in market value of the various classes and kinds of commodities as indicated over a reasonable period of years, to a natural and proper development of the country as a whole, and to the maintenance of an adequate system of transportation. In the progress of such investigation the commis-

sion shall, from time to time, and as expeditiously as possible, make such decisions and orders as it may find to be necessary or appropriate upon the record then made in order to place the rates upon designated classes of traffic upon a just and reasonable basis with relation to other rates. Such investigation shall be conducted with due regard to other investigations or proceedings affecting rate adjustments which may be pending before the commission.

"In view of the existing depression in agriculture, the commission is hereby directed to effect with the least practicable delay such lawful changes in the rate structure of the country as will promote the freedom of movement by common carriers of the products of agriculture affected by that depression, including livestock, at the lowest possible lawful rates compatible with the maintenance of adequate transportation service: *Provided,* That no investigation or proceeding resulting from the adoption of this resolution shall be permitted to delay the decision of cases now pending before the commission involving rates on products of agriculture, and that such cases shall be decided in accordance with this resolution."

The original and supplemental opinions of the commission show quite plainly that the commission based the order entirely upon the joint resolution. It is said in the opinions that "the joint resolution was primarily relied upon" by the complainant; that while a violation of § 3(1) of the Interstate Commerce Act was alleged in the complaint "no great reliance was placed upon that allegation"; that the "primary issue to be determined" was whether the existing rates were in accord with the resolution; that the resolution effected a change "in the basic law"; and that this change operated to eliminate a decision made June 25, 1925, in another proceeding between the same parties wherein the commission found the same rates neither unreasonable nor unduly preferential and

sustained them as lawful rates, 100 I. C. C. 79. True, in both the original and supplemental opinions it is said that the existing rates are unreasonable, but the opinions taken as a whole show that this means the rates were deemed unreasonable under the joint resolution when construed as the commission construed it, and not that they were deemed unreasonable under § 1(5) or § 3(1) of the Interstate Commerce Act. Throughout the opinions it is manifest that the commission was testing the reasonableness and validity of the rates by considerations not applicable under those sections but believed by it to have been brought into the problem by the resolution.

The joint resolution is the outgrowth of several measures proposed in Congress but not adopted. Some of the measures may have been designed by their proposers to make real changes in existing laws relating to transportation rates. But they are not before us. The measure that is before us is the joint resolution which emerged from the legislative deliberations and proceedings. It is brought here to the end that we may determine its proper construction, which of course is to be done by applying to it the rules applicable to legislation in general.

The question presented is whether the resolution changes the substantive provisions of existing laws relating to transportation rates, and particularly whether rates which would be lawful under those laws are made unlawful by it.

The resolution is in three paragraphs. The first declares it to be a true policy in rate making that the conditions which at any given time prevail in the several industries "should be considered" in so far as it is "legally possible" to do so, to the end that commodities may move freely. This policy is not new. In rate making under existing laws it has been recognized that conditions in a particular industry may and should be considered along with other factors in fixing rates for that

industry and in determining their reasonableness; and it also has been recognized that so far as can be done with due regard for the interests affected rates should be such as will permit the commodities to which they relate to move freely in the channels of commerce.

The second paragraph is devoted chiefly to requiring the Commission to proceed along stated lines for the purpose of securing prompt observance of existing laws, such as §§ 1(5) and 3(1) of the Interstate Commerce Act, requiring that all rates be just and reasonable and prohibiting all undue preferences and unjust discriminations, whether relating to shippers, commodities, classes of traffic or localities. The only substantive provision in the paragraph is one declaring that in the adjustment of rates the factors to be considered shall include (a) the general and comparative levels in market value of the various classes and kinds of commodities as indicated over a reasonable period of years, (b) a natural and proper development of the country as a whole, and (c) the maintenance of an adequate system of transportation. These matters have all been regarded as factors requiring consideration under existing laws. The prohibition in § 3(1) of the Interstate Commerce Act of any undue preference of one locality over another always has been treated as intended to prevent the use of rates as a means of promoting the artificial development of one locality to the detriment of another. And what is said about the maintenance of an adequate system of transportation is but a reiteration of provisions embodied in existing laws.

The third paragraph was construed by the commission as making a change "in the basic law," as placing agricultural products in a "most favored" class, and as justifying a reduction in the rates on deciduous fruits moving from California to eastern points, notwithstanding most of the carriers "have not as yet made the fair return" for which § 15a of the Interstate Commerce Act

makes provision as a means of securing the maintenance of an adequate transportation system. Indeed, it is apparent from the commission's opinions that it regarded this paragraph as requiring it to condemn the existing rates as unreasonable and unlawful, although, had they been considered independently of the paragraph, they must have been upheld as reasonable and lawful under the applicable sections, 1(5) and 3(1), of the existing law.

We are of opinion that the commission's construction can not be supported. The paragraph does not purport to make any change in the existing law, but on the contrary requires that that law be given effect. Nor does it purport to make unlawful any rate which under the existing law is a lawful rate, but on the contrary leaves the validity of the rate to be tested by that law.

The paragraph requires only that "lawful changes" in the rate structure be made; and we find in it no sanction for any other change. Unless the paragraph can be said to give its own definition of a lawful change, reference must be had to § 15, par. (1) of the existing law which shows under what conditions and how a lawful change of rate may be effected by the commission.

The commission stresses the concluding words in the same sentence with "lawful changes" and evidently regards them as qualifying the natural import of the latter and in effect specifying a new and reduced scale to be applied in rate making. The words stressed are, "at the lowest possible lawful rates compatible with the maintenance of adequate transportation service."

Considering the connection in which these words are brought into the sentence, we think they fall much short of supporting the construction adopted by the commission. They are more in the nature of a hopeful charac-

terization of an object deemed desirable if, and in so far as, it may be attainable, than of a rule intended to control rate making. See *United States* v. *New York Central R. R. Co.*, 263 U. S. 603. Of course they should not lightly be disregarded. Neither should they lightly be accepted as overturning positive and unambiguous provisions constituting part of a system of laws reflecting a settled legislative policy, such as the Interstate Commerce Act. If they mean no more than that the depressed condition of the industry is to be given such consideration as may be reasonable considering the nature and cost of the transportation service and the need for maintaining an adequate transportation system, they work no change in the existing law. But if they mean more and are intended to require that rates be reduced to some uncertain level below that standard, they give rise to a serious question respecting the constitutional validity of the paragraph of which they are a part. See *Northern Pacific R. R. Co.* v. *North Dakota*, 236 U. S. 585, 595; *Norfolk & Western Ry. Co.* v. *West Virginia*, 236 U. S. 605, 608. By reason of their uncertain meaning, *United States* v. *Barnes*, 222 U. S. 513, 520, and of the constitutional question which would be raised if they were taken as the commission thinks they should be taken, *Harriman* v. *Interstate Commerce Commission*, 211 U. S. 407, 422, we think they must be held to work no substantial change in the meaning or operation of §§ 1(5), 3(1) and 15, par. (1) of the existing law.

Our conclusion is that the order of the commission was based upon an erroneous construction of the joint resolution, and therefore should have been set aside by the court below.

Decree reversed.

PANAMA MAIL STEAMSHIP COMPANY *v.* VARGAS.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 425. Argued April 23, 24, 1930.—Decided June 2, 1930.

Where the District Court gave a decree in admiralty for damages on doubtful and conflicting evidence, without delivering an opinion or making any finding of fact other than might be implied in the decree, and affirmance by the Court of Appeals was based solely upon the ground that appellate courts, in the absence of plain error, refuse to review decisions of trial courts upon conflicting testimony taken before them, this Court, being unable to determine from the record upon what premise of fact or law the decree of the District Court was based, *held* that both decrees below should be vacated and the case remanded to the District Court with a direction to make specific findings of fact, retrying the case if necessary, and to take such further proceedings as might be in conformity with law. P. 671.

33 F. (2d) 894, reversed.

CERTIORARI, 280 U. S. 546, to review a decree of the Circuit Court of Appeals affirming a recovery of damages for an assault alleged to have been committed upon a passenger aboard ship by a ship's steward.

Mr. Thomas A. Thacher, with whom *Messrs. Harrison A. Jones* and *W. Kevin Casey* were on the brief, for petitioner.

Mr. H. W. Hutton for respondent.

MR. JUSTICE VAN DEVANTER delivered the opinion of the Court.

This is a suit in admiralty brought in the District Court of the United States for the Northern District of California against a company owning and operating an American steamship as a common carrier, between ports in

Central America and the port of San Francisco, to recover damages for an alleged assault constituting rape committed by an employee of the ship on a young woman while being carried thereon as a passenger. The plaintiff was given a decree, which the Circuit Court of Appeals affirmed, 33 F. (2d) 894; and the case is here on certiorari.

The District Court delivered no opinion and made no findings of fact other than such as may be implied from the decree. The Circuit Court of Appeals described the evidence as conflicting, the plaintiff's case as not free from suspicion, and the defense as weak; and it then affirmed the decree on the stated ground that appellate courts refuse to review decisions of trial courts based on conflicting testimony taken before them, unless the record discloses some plain error of fact or some misapplication of the law.

Thus we have a case in which the evidence is conflicting—pronouncedly so according to the argument in this Court—and in which there has been no distinct finding of the facts by the court primarily charged with their determination. No doubt a finding of some kind is to be implied from the decree—a finding that would suffice as against a collateral attack. But the present attack is direct, not collateral. It is made in an appellate proceeding where the review, unlike that on a writ of error at law, extends to the findings of fact as well as to the rulings on questions of law. The decree does not show on what premise of fact it was given, but only that it was given on some premise which in the court's opinion entitled the plaintiff to the decree. The court may have regarded the evidence as showing seduction rather than rape and may have given the decree on the theory that the defendant was equally liable in either case. In the absence of distinct findings an appellate court cannot know how the questions of fact were resolved. The situation is much like that described in the following extract

from *Lawson* v. *United States Mining Co.*, 207 U. S. 1, 11:

"It is insisted that the findings of the Circuit Court should have bound and concluded the Court of Appeals upon questions of fact. The difficulty with this contention is that there is nothing to show what the Circuit Court found to be the facts. Whatever might have been suggested by the course of the argument at the hearing, the comments of the court upon such argument, or in announcing its decision, there is nothing in the record to indicate whether its decision was based upon a question of fact or a matter of law. The record only contains its decree, dismissing the bill. All else is a matter of surmise, except as may be inferred from the allegations of the pleadings and the scope of the testimony While it is apparent that the Circuit Court must have based its decision upon one of two or three grounds, yet upon which it is not certain."

And see *City of New York*, 54 Fed. 181.

Formerly it was the general practice in suits in admiralty to make distinct findings on the issues of fact; and while that practice placed an added duty on trial judges it was attended with undoubted advantages, in that it made for greater precision in the disposal of such suits in the trial courts and facilitated the presentation and consideration of appeals from decrees therein.

In the present case we think the situation requires that the decrees in both courts below be vacated and the case remanded to the District Court with a direction to make specific findings of fact and to take such further proceedings as may be in conformity with law.

If the judge who presided at the trial and rendered the decree is prepared to make such findings without a further trial, that course may be taken; otherwise the case should be retried.

Decrees vacated and cause remanded for further proceeding in conformity with this opinion.

BRINKERHOFF-FARIS TRUST & SAVINGS COMPANY *v.* HILL, TREASURER AND EX-OFFICIO COLLECTOR OF HENRY COUNTY, MISSOURI.

CERTIORARI TO THE SUPREME COURT OF MISSOURI.

No. 464. Argued May 1, 1930.—Decided June 2, 1930.

1. A federal claim first raised by petition for rehearing in a state court is in time for purposes of review here if it was raised at the first opportunity, even though the petition was denied without opinion. P. 677.
2. Where, under repeated constructions of laws of a State, consistently acted upon in administrative practice, a suit in equity to enjoin collection was the appropriate and the only remedy against a discriminating state tax violative of the equal protection clause of the Fourteenth Amendment, and the state court, overruling its earlier decisions, denies this remedy, not for want of power, but upon the ground that the party seeking it should first have exhausted an administrative remedy, which, under the decisions overruled, was never open to him, and which, under the overruling decision, it is too late for him to invoke, — the judgment violates due process of law, in its primary sense of an opportunity to be heard and to defend one's substantive right. P. 678.
3. The federal guaranty of due process extends to state action through its judicial as well as through its legislative, executive or administrative branch of government. P. 679.
4. Whether acting through its judiciary or through its legislature, a State may not deprive a person of all existing remedies for the enforcement of a right, which the State has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it. P. 682.
5. The state court having dismissed the bill upon a ground not sufficient to support the judgment independently, without deciding whether the plaintiff's allegations, presenting a claim under the equal protection clause, were sustained by proof, this Court does not inquire into the merits of that claim, but reverses the judgment and remands the case for further proceedings. *Id.*

323 Mo. 180, reversed.

CERTIORARI, 280 U. S. 550, to review a judgment of the Supreme Court of Missouri affirming the dismissal of a bill to enjoin the collection of taxes.

Mr. Roy W. Rucker, with whom *Messrs. John Montgomery, Jr.,* and *Lee Montgomery* were on the brief, for petitioner.

Mr. Lieutellus Cunningham, with whom *Messrs. Stratton Shartel,* Attorney General of Missouri, *N. B. Conrad, Frederick F. Wesner,* and *Charles A. Calvird, Jr.,* were on the brief, for respondent.

Mr. Justice Brandeis delivered the opinion of the Court.

In 1928, the Brinkerhoff-Faris Trust & Savings Company, acting as trustee for its shareholders, brought this suit in a Missouri court against the Treasurer of Henry County, Missouri, to enjoin him from collecting or attempting to collect a certain part of the taxes assessed against them for the year 1927 on the shares of its stock; and, pending decision in this suit, to restrain the prosecution of an action already brought by him against the plaintiff for that purpose.

The bill alleged that the township assessor had intentionally and systematically discriminated against the shareholders by assessing bank stock at full value, while intentionally and systematically omitting to assess certain classes of property and assessing all other classes of property at 75 per cent or less of their value. It asserted that, to the extent of 25 per cent, the assessments were void because such discrimination violated the equal protection clause of the Fourteenth Amendment. And it recited that the plaintiff had tendered, and was continuing to tender, payment of the 75 per cent of the taxes assessed, which amount it conceded was due. As grounds for equity jurisdiction, the bill charged that relief could not be had at law, either by way of defense in the pending action brought by the Treasurer or by paying the tax in full under protest and suing for a refund of 25 per cent thereof; and that no administrative remedy for the relief

sought was, or ever had been, provided by law either by appeal or otherwise to or from the County Board of Equalization or the State Board of Equalization.

The defendant's answer denied all the allegations of discrimination and further opposed relief in equity on the grounds that the plaintiff had not pursued remedies before the County or State Board of Equalization pursuant to Articles 3 and 5 of Chapter 119 of the Missouri Revised Statutes of 1919; and that the plaintiff was guilty of laches in not so doing. The trial court refused the injunction and dismissed the bill, without opinion or findings of fact.

The Supreme Court of Missouri held, on appeal, that relief from the alleged discriminatory assessment could not be had in any suit at law; that this bill in equity was the appropriate and only remedy, unless relief could have been had by timely application to some administrative board; and that neither of the boards of equalization was charged with the power and duty to grant such relief. But, without passing definitely upon the question of discrimination, it concluded that if the plaintiff had " at any time before the tax books were delivered to the collector, filed complaint before the State Tax Commission, that body, in the proper exercise of its jurisdiction, would have granted a hearing, and would have heard evidence with respect to the valuations complained of, and, if the charges contained in the complaint had been found to be true, the valuations placed on its property would have been lowered, or that on other property raised, the property omitted from the assessment roll would have been placed thereon, and the discrimination complained of thereby removed. The remedy provided by the statute is adequate, certain, and complete." Compare *First National Bank of Greeley* v. *Weld County,* 264 U. S. 450. The court held, therefore, that, because plaintiff had this ade-

quate legal remedy, it was not entitled to equitable relief, and because plaintiff had not complained to the Tax Commission, "it was clearly guilty of laches in not so doing." On these grounds, the Supreme Court affirmed the judgment of the trial court. 323 Mo. 180.

The powers and duties of the State Tax Commission are prescribed by Article 4 of Chapter 119 of the Revised Statutes of 1919. Six years before this suit was begun, those provisions had been construed by the Supreme Court of Missouri in *Laclede Land & Improvement Co.* v. *State Tax Commission,* 295 Mo. 298. There, the court had been required to determine whether the Commission had power to grant relief of the character here sought. The Commission had refused, on the ground of lack of power, an application for relief from discrimination similar to that here alleged. The Laclede Company petitioned for a mandamus to compel the Commission to hear its complaint. The Supreme Court denied the petition, saying that it was "preposterous" and "unthinkable" that the statute conferred such power on the Commission; and that if the statute were thus construed, it would violate section 10 of article 10 of the constitution of Missouri. That decision was thereafter consistently acted upon by the Commission; and it was followed by the Supreme Court itself in later cases.[1]

[1] In *Boonville National Bank* v. *Schlotzhauer,* 317 Mo. 1298, where the taxpayer was represented by the same counsel who represent the plaintiff here, relief was sought by bill in equity from like discrimination, without prior application to the State Tax Commission. The Supreme Court of Missouri was required to decide whether the taxpayer had invoked the appropriate remedy; and it held, in an elaborate opinion which did not mention the Tax Commission, that the remedy pursued was the appropriate one and that the taxpayer was entitled to relief thereby, if the facts alleged were proved. See also *Jefferson City Bridge & Transit Co.* v. *Blaser,* 318 Mo. 373; *Columbia Terminals Co.* v. *Koeln,* 3 S. W. (2d) 1021; *State* v. *Baker,* 9 S. W. (2d) 589, 592–93; *State* v. *Dirckx,* 11 S. W. (2d) 38.

No one doubted the authority of the *Laclede* case until it was expressly overruled in the case at bar.[2] While the defendant's answer asserted that the plaintiff had not availed itself of the administrative remedies under Articles 3 and 5 of Chapter 119 by application to the boards of equalization and was guilty of laches in not so doing (contentions which the state court held to be unsound), the answer significantly omitted any contention that there had been a remedy by application to the State Tax Commission, whose powers are dealt with in the intervening Article 4. The possibility of relief before the Tax Commission was not suggested by anyone in the entire litigation until the Supreme Court filed its opinion on June 29, 1929. Then it was too late for the plaintiff to avail itself of the newly found remedy. For, under that decision, the application to the Tax Commission could not be made after the tax books were delivered to the collector; and this had been done about October 1, 1927.

The plaintiff seasonably filed a petition for a rehearing in which it recited the above facts and asserted, in addition to its claims on the merits, that, in applying the new construction of Article 4 of Chapter 119 to the case at bar, and in refusing relief because of the newly found powers of the Commission, the court transgressed the due

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[2] The reason which prompted the Supreme Court to reëxamine and overrule the *Laclede* case is thus stated in its opinion: "It is doubtful whether the evidence in this case warrants a finding that the local assessor intentionally and systematically undervalued real estate and personal property listed with him, other than bank stock; but there can be no question but that his failure to assess sucking animals and poultry was both intentional and pursuant to system. . . . If the owners of bank stock are entitled to an abatement of a portion of their taxes because other property was undervalued, it would appear on principle that all taxpayers of the state should be entirely relieved, so far as the taxes for 1927 are concerned, because the owners of poultry were not taxed at all. It seems necessary that we rechart our course." 323 Mo. 180; 19 S. W. (2d) 746, 749.

process clause of the Fourteenth Amendment. The additional federal claim thus made was timely, since it was raised at the first opportunity. *Missouri ex rel. Missouri Ins. Co.* v. *Gehner, ante,* p. 313. The petition was denied without opinion. This Court granted certiorari, 280 U. S. 550. We are of opinion that the judgment of the Supreme Court of Missouri must be reversed, because it has denied to the plaintiff due process of law—using that term in its primary sense of an opportunity to be heard and to defend its substantive right.

First. It is plain that the practical effect of the judgment of the Missouri court is to deprive the plaintiff of property without affording it at any time an opportunity to be heard in its defense. The plaintiff asserted an invasion of its substantive right under the Federal Constitution to equality of treatment. *Greene* v. *Louisville & Interurban R. R. Co.,* 244 U. S. 499; *Sioux City Bridge Co.* v. *Dakota County,* 260 U. S. 441. If the allegations of the complaint could be established, the Federal Constitution conferred upon the plaintiff the right to have the assessments abated by 25 per cent. In order to protect its property from being seized in payment of the part of the tax alleged to be unlawful, the plaintiff invoked the appropriate judicial remedy provided by the State. *Second Employers' Liability Cases,* 223 U. S. 1, 55–57.

Under the settled law of the State, that remedy was the only one available. That a bill in equity is appropriate and that the court has power to grant relief, even under the new construction of the statute dealing with the Tax Commission, is not questioned.[3] And it is held by the state court in this case that no other judicial remedy is open to the plaintiff and that no administrative

[3] Equitable relief was denied solely on the equitable doctrines that the plaintiff had an adequate legal remedy by application to the Commission and was guilty of laches in not pursuing it.

remedy, other than that before the State Tax Commission, has been provided. But, after the decision in the *Laclede* case, it would have been entirely futile for the plaintiff to apply to the Commission. That body had persistently refused to entertain such applications; and the Supreme Court of the State had supported it in its refusal. Thus, until June 29, 1929, when the opinion in the case at bar was delivered, the Tax Commission could not, because of the rule of the *Laclede* case, grant the relief to which the plaintiff was entitled on the facts alleged. After June 29, 1929, the Commission could not grant such relief to this plaintiff because, under the decision of the court in this case, the time in which the Commission could act had long expired. Obviously, therefore, at no time did the State provide to the plaintiff an administrative remedy against the alleged illegal tax; and in invoking the appropriate judicial remedy, the plaintiff did not omit to comply with any existing condition precedent. *Montana National Bank* v. *Yellowstone County,* 276 U. S. 499, 505.

If the judgment is permitted to stand, deprivation of plaintiff's property is accomplished without its ever having had an opportunity to defend against the exaction. The state court refused to hear the plaintiff's complaint and denied it relief, not because of lack of power or because of any demerit in the complaint, but because, assuming power and merit, the plaintiff did not first seek an administrative remedy which, in fact, was never available and which is not now open to it. Thus, by denying to it the only remedy ever available for the enforcement of its right to prevent the seizure of its property, the judgment deprives the plaintiff of its property.

Second. If the result above stated were attained by an exercise of the State's legislative power, the transgression of the due process clause of the Fourteenth Amendment

would be obvious. *Ettor* v. *Tacoma*, 228 U. S. 148.[4] The violation is none the less clear when that result is accomplished by the state judiciary in the course of construing an otherwise valid (*First National Bank of Greeley* v. *Weld County*, 264 U. S. 450) state statute. The federal guaranty of due process extends to state action through its judicial as well as through its legislative, executive or administrative branch of government.[5]

It is true that the courts of a State have the supreme power to interpret and declare the written and unwritten laws of the State; that this Court's power to review decisions of state courts is limited to their decisions on federal questions; [6] and that the mere fact that a state court has rendered an erroneous decision on a question of state law, or has overruled principles or doctrines established by previous decisions on which a party relied, does not give rise to a claim under the Fourteenth Amendment or otherwise confer appellate jurisdiction on this Court.[7]

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[4] Compare *Turner* v. *New York*, 168 U. S. 90, 94; *Saranac Land & Timber Co.* v. *Comptroller*, 177 U. S. 318, 325; *Crane* v. *Hahlo*, 258 U. S. 142, 147; *Atchafalaya Land Co.* v. *F. B. Williams Cypress Co.*, 258 U. S. 190, 197.

[5] *Ownbey* v. *Morgan*, 256 U. S. 94, 111. Compare *Pennoyer* v. *Neff*, 95 U. S. 714; *Standard Oil Co.* v. *Missouri*, 224 U. S. 270, 281; *Frank* v. *Mangum*, 237 U. S. 309, 326, 335; *Moore* v. *Dempsey*, 261 U. S. 86.

[6] *Kryger* v. *Wilson*, 242 U. S. 171, 176; *Mount St. Mary's Cemetery Ass'n* v. *Mullins*, 248 U. S. 501, 503; *Quong Ham Wah Co.* v. *Industrial Accident Comm.*, 255 U. S. 445, 448; *Fox River Paper Co.* v. *Railroad Comm.*, 274 U. S. 651, 655.

[7] *Central Land Co.* v. *Laidley*, 159 U. S. 103, 112; *Patterson* v. *Colorado*, 205 U. S. 454, 461; *Willoughby* v. *Chicago*, 235 U. S. 45, 50; *O'Neil* v. *Northern Colorado Irrigation Co.*, 242 U. S. 20, 26–7; *Dunbar* v. *City of New York*, 251 U. S. 516, 519; *Rooker* v. *Fidelity Trust Co.*, 261 U. S. 114, 118; *Tidal Oil Co.* v. *Flanagan*, 263 U. S. 444, 450; *American Railway Express Co.* v. *Kentucky*, 273 U. S. 269, 273. For "a long line of decisions" holding "that the provision of § 10, Article 1, of the Federal Constitution, protecting the obligation

But our decision in the case at bar is not based on the ground that there has been a retrospective denial of the existence of any right or a retroactive change in the law of remedies. We are not now concerned with the rights of the plaintiff on the merits, although it may be observed that the plaintiff's claim is one arising under the Federal Constitution and, consequently, one on which the opinion of the state court is not final; or with the accuracy of the state court's construction of the statute in either the *Laclede* case or in the case at bar. Our present concern is solely with the question whether the plaintiff has been accorded due process in the primary sense,—whether it has had an opportunity to present its case and be heard in its support. Undoubtedly, the state court had the power to construe the statute dealing with the State Tax Commission; and to reëxamine and overrule the *Laclede* case. Neither of these matters raises a federal question; neither is subject to our review.[8] But,

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of contracts against state action, is directed only against impairment by legislation and not by judgments of courts," see *Tidal Oil Co.* v. *Flanagan,* 263 U. S. 444, 451, note 1. Likewise, with reference to *ex post facto* laws. *Kring* v. *Missouri,* 107 U. S. 221, 227; *Ross* v. *Oregon,* 227 U. S. 150, 161; *Frank* v. *Mangum,* 237 U. S. 309, 344.

[8] The process of trial and error, of change of decision in order to conform with changing ideas and conditions, is traditional with courts administering the common law. Since it is for the state courts to interpret and declare the law of the State, it is for them to correct their errors and declare what the law has been as well as what it is. State courts, like this Court, may ordinarily overrule their own decisions without offending constitutional guaranties, even though parties may have acted to their prejudice on the faith of the earlier decisions. The doctrine of *Gelpcke* v. *Dubuque,* 1 Wall. 175, and *Butz* v. *Muscatine,* 8 Wall. 575, like that of *Swift* v. *Tyson,* 16 Pet. 1, is, if applied at all, confined strictly to cases arising in the Federal courts. *Fleming* v. *Fleming* 264 U. S. 29, 31; *Tidal Oil Co.* v. *Flanagan,* 263 U. S. 444, 451; *Moore-Mansfield Const. Co.* v. *Electrical Installation Co.,* 234 U. S. 619, 624–26; *Bacon* v. *Texas,* 163 U. S. 207, 220–24; *Central Land Co.* v. *Laidley,* 159 U. S. 103, 111–12.

while it is for the state courts to determine the adjective as well as the substantive law of the State, they must, in so doing, accord the parties due process of law. Whether acting through its judiciary or through its legislature, a State may not deprive a person of all existing remedies for the enforcement of a right, which the State has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it.[9] Compare *Postal Telegraph Cable Co.* v. *Newport*, 247 U. S. 464, 475–6.

Third. The court's finding of laches was predicated entirely on the plaintiff's failure to apply to the State Tax Commission. In view of what we have said, this ground is not sufficient independently to support the judgment. And, as the Supreme Court of Missouri did not decide whether the allegations of the plaintiff's bill were sustained by the proof, we do not inquire into the merits of the plaintiff's claim under the equal protection clause. The judgment is reversed and the case remanded for further proceedings not inconsistent with this opinion.

Reversed.

MR. JUSTICE MCREYNOLDS did not hear the argument and took no part in the decision of this case.

NEW ORLEANS PUBLIC SERVICE, INCORPORATED, *v.* CITY OF NEW ORLEANS.

APPEAL FROM THE SUPREME COURT OF LOUISIANA.

No. 460. Argued April 30, 1930.—Decided June 2, 1930.

Under authority contained in a city ordinance granting it a franchise to construct and operate a street railway along a city street,

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[9] Had there been no previous construction of the statute by the highest court, the plaintiff would, of course, have had to assume the risk that the ultimate interpretation by the highest court might differ from its own. Likewise, if the administrative remedy were still available to the plaintiff, there would be no denial of due process in that regard.

a company constructed, upon plans approved by the city, a single-track viaduct for the passage of its cars over railroad tracks. When the viaduct had long been in use, was about to become inadequate, and was also unsafe and in need of extensive repairs, the city by ordinance required the company to remove it and to construct in its place double tracks at street level crossing the railroad. *Held:*

1. The later ordinance purports merely to regulate the use of the streets for the convenience and safety of the public and does not impair the company's franchise P. 685.

2. The ordinance is presumed to be valid and the burden is upon the company to show that, having regard to the facts disclosed by the record, removal of the existing viaduct and construction of the crossings are so clearly unreasonable and arbitrary as to amount to depriving the company of its property without due process of law. P. 686.

3. The city, acting as the arm of the State, has a wide discretion in determining what precautions in the public interest are necessary or appropriate under the circumstances. *Id.*

4. Enforcement of uncompensated obedience to a regulation passed in the legitimate exertion of the police power is not a taking of property without due process of law. P. 687.

5. The ordinance can not, upon the evidence, be held unreasonable because of the expense involved to the company in the sacrifice of the viaduct and the construction of the new crossings. *Id.*

6. It is to be presumed, in support of the ordinance, that the city will make and enforce appropriate regulations to safeguard against collisions at the grade crossing. *Id.*

168 La. 983, affirmed.

APPEAL from a decree affirming a decree for the City in its suit to require the appellant herein to remove a street railway viaduct and construct double tracks at street level across railroad tracks.

Mr. Alfred Charles Kammer, with whom *Mr. Charles Rosen* was on the brief, for appellant.

Messrs. Wm. F. Conkerton and *Francis P. Burns,* Assistant City Attorneys, with whom *Mr. Bertrand I. Cahn,* City Attorney, was on the brief, for appellee.

MR. JUSTICE BUTLER delivered the opinion of the Court.

The question presented by this appeal is whether an ordinance of the city of New Orleans requiring the demolition of a viaduct and construction of grade crossings to take its place violates the contract clause of the Federal Constitution or the due process clause of the Fourteenth Amendment. 28 U. S. C., § 344(a). *King Mfg. Co.* v. *Augusta,* 277 U. S. 100.

Appellant has a franchise granted by the city for the operation of a street railway system. One of its lines was constructed along Franklin Avenue. That street intersects Florida Walk which is occupied by eight railroad tracks now used by the Southern Railway Company. March 9, 1910, the city passed Ordinance 6445. It recited that the railroad company objected to the street railway crossing its tracks at grade, that the public interest would best be served by a viaduct crossing and that the street railway was willing to build one. It authorized the city engineer to approve plans for a viaduct to be constructed approximately on the center line of Franklin Avenue and to embrace earthen embankment approaches that would not exceed the neutral space in Franklin Avenue or obstruct the roadways on either side of it. Following the adoption of the ordinance the company built a single-track trestle viaduct which has since been maintained and used for the passage of its street cars over the railroad tracks. November 7, 1926, the city passed Ordinance 9375 requiring appellant to remove the viaduct and to construct in its place double tracks at street level across the railroad tracks. Appellant refused and the city brought this suit to compel compliance.

The complaint alleges: Because of increase of population, the single track is not sufficient to provide adequate service for the people of that section. The viaduct has

not been properly maintained and is dangerous to the public. In order to eliminate grade crossings where Franklin Avenue intersects the railroad tracks of the Louisville and Nashville Railroad Company, it would be necessary to demolish the present viaduct and to construct across the tracks of both railroad companies a new viaduct for two street-railway tracks, two vehicular roadways and two walks for pedestrians. The city would have to contribute one-half the cost of such construction (Act 38 of 1924) and it is not financially able to do so at the present time. The answer denies that the single track viaduct is not sufficient to furnish adequate service or that it is unsafe. It avers: The ordinance required the construction of the viaduct; it cost approximately $58,000, and its purpose was to avoid having grade crossings over much used railroad tracks. New crossings are not necessary. They will cost more than $135,000 and subject users to hazards the viaduct was constructed to avoid. The ordinance is arbitrary and violates the contract clause of the Federal Constitution and the due process clause of the Fourteenth Amendment. The trial court, without making any specific findings of fact, entered a decree for the city; the supreme court affirmed. 168 La. 983.

Appellant cites *Grand Trunk Western Ry.* v. *South Bend,* 227 U. S. 544, and *Owensboro* v. *Cumberland Telephone Co.,* 230 U. S. 58, in each of which this Court condemned a city ordinance as repugnant to the contract clause. In the former the ordinance attempted to repeal a valid grant of a right to use a street for a railroad purpose that was found not to be injurious to the public. In the latter the ordinance purported to require the telephone company to remove from city streets its poles and wires which had been placed there under authority granted by an earlier ordinance or to make payments not provided for in the contract under which the telephone lines were constructed. Neither of these cases has any

application here. The ordinance now under consideration does not aim to destroy or to exact payment for the right of appellant to use the street for the operation of its street railway. It purports merely to regulate the use of the streets for the convenience and safety of the public. It does not impair appellant's franchise.

The ordinance is presumed to be valid and the burden is upon the appellant to show that, having regard to the facts disclosed by the record, removal of the existing viaduct and construction of the crossings are so clearly unreasonable and arbitrary as to amount to the depriving of appellant of its property without due process of law. *Aetna Insurance Co.* v. *Hyde,* 275 U. S. 440, 447, 448. Undoubtedly the city, acting as the arm of the State, has a wide discretion in determining what precautions in the public interest are necessary or appropriate under the circumstances. *Terrace* v. *Thompson,* 263 U. S. 197, 217. *Denver & R. G. R. R. Co.* v. *Denver,* 250 U. S. 241, 244. Regulations that are in principle fairly comparable to the ordinance under consideration have been sustained by this Court as within the scope of the police power.*

Ordinance 6445 merely authorized the street railway company so to use the streets. No element of coercion was involved. The opinion of the supreme court shows that one of the roadways has been narrowed by the city's construction of a sidewalk and, granting that the track is not presently inadequate, indicates that additional capacity for service at this intersection is likely to be needed. And, upon sufficient evidence, the court found that the viaduct is unsafe and that extensive repairs are required to put it in proper condition.

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* *Denver & R. G. R. R. Co.* v. *Denver,* 250 U. S. 241. *Chi., Mil. & St. P. Ry.* v. *Minneapolis,* 232 U. S. 430. *Mo. Pac. Ry.* v. *Omaha,* 235 U. S. 121. *N. Y. & N. E. Railroad Co.* v. *Bristol,* 151 U. S. 556. *Baltimore* v. *Baltimore Trust Co.,* 166 U. S. 673. *New Orleans Gas Co.* v. *Drainage Comm.,* 197 U. S. 453.

The value of the viaduct to be removed, the large expenditure involved for construction of the crossings in its place, and the dangers incident to their use constitute the sole basis of fact on which the ordinance is assailed. It is elementary that enforcement of uncompensated obedience to a regulation passed in the legitimate exertion of the police power is not a taking of property without due process of law. *Chicago, B. & Q. Railroad* v. *Chicago,* 166 U. S. 226, 251. *C. B. & Q. Railway* v. *Drainage Comm'rs,* 200 U. S. 561, 594. *Chicago & Alton R. R.* v. *Tranbarger,* 238 U. S. 67, 77. The sacrifice of the old structure and the cost of the new crossings involve a large amount of money. But the evidence fails to show that, having regard to the circumstances, it is so large that the regulation must be held to pass the limits of reasonable judgment and amount to an infringement of the right of ownership. While the elimination of grade crossings is desirable in the interest of safety, there are other means that reasonably may be employed to safeguard against collisions at intersections of public streets and railroad tracks. Presumably the city will make and enforce appropriate regulations at this crossing. Appellant has failed to establish facts sufficient to require a finding that under conditions existing there it is not reasonably possible so to do. And it has not shown that the ordinance is so unreasonable that it transgresses constitutional limitations.

Decree affirmed.

DECISIONS PER CURIAM, FROM JANUARY 28, 1930, TO AND INCLUDING JUNE 2, 1930.*

No. 6, original. OKLAHOMA *v.* TEXAS ET AL. February 24, 1930. ORDER approving a statement by Samuel S. Gannett, commissioner, of the cost of running, locating, and marking the boundary along the one hundredth meridian, as directed by the decree of January 3, 1927 (273 U. S. 93), and adjudging that the United States pay to the State of Texas one-third thereof.

No. 500. EX PARTE MURRAY. Appeal from the Supreme Court of California. Jurisdictional statement submitted January 27, 1930. Decided February 24, 1930. *Per Curiam:* The appeal is dismissed for the want of a substantial federal question. *Shulthis* v. *McDougal,* 225 U. S. 561, 569; *Hull* v. *Burr,* 234 U. S. 712, 720; *Norton* v. *Whiteside,* 239 U. S. 144, 147. Treating the papers whereon the appeal was allowed as a petition for certiorari, as required by § 237 (c) of the Judicial Code, as amended by the Act of February 13, 1925 (c. 229, 43 Stat. 936, 938), the certiorari is denied. *Messrs. Roland Becsey* and *William F. Herron* for Murray. Reported below: 207 Cal. 507.

No. 9. GRANT, RECEIVER, *v.* A. B. LEACH & COMPANY, INC. Certiorari to the Circuit Court of Appeals for the Sixth Circuit. February 24, 1930. It is ordered that the printed opinion handed down in this case on January 6, 1930, be amended by striking out the last clause in the

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* For decisions on applications for certiorari see *post,* pp. 706, 720.

second sentence of section 1 at the top of page 2, reading "in exchange for 3,000 shares of the seven per cent preferred stock of the Furnace Company, at 85 and accrued dividends," and substituting therefor the following: "for which it paid partly in shares of the seven per cent preferred stock of the Furnace Company, at 85 and accrued dividends, and partly in cash." See 280 U. S. 351, 354.

No. —, original. Ex parte Lopez. Motion submitted February 24, 1930. Decided March 3, 1930. The motion for leave to file a petition for a writ of mandamus is denied. *Mr. William J. Rohde* for Lopez.

No. 21, original. Ex parte Northern Pacific Ry. Co. et al. March 3, 1930. *Per Curiam:* The returns of Charles N. Pray and George M. Bourquin, district judges of the United States, to the peremptory writ of mandamus heretofore issued in this cause have been received and are ordered to be filed;

It is ordered that an entry be made upon the minutes and journal of this Court showing that the writ of mandamus has been obeyed. See 280 U. S. 142.

No. 663. Grant *v.* Glynn Canning Co. et al. Appeal from the Supreme Court of Georgia. Motion submitted February 24, 1930. Decided March 3, 1930. *Per Curiam:* The appeal herein is dismissed for the want of jurisdiction upon the authority of § 237 (a) of the Judicial Code as amended by the Act of February 13, 1925 (43 Stat. 936, 937). Treating the papers whereon the appeal was allowed as a petition for writ of certiorari, as required by § 237 (c) of the Judicial Code as amended by the Act of February 13, 1925 (43 Stat. 936, 938), certiorari

is denied. The motion for leave to proceed further herein *in forma pauperis* is therefore also denied. *Mr. Virgil E. Adam* for appellant. No appearance for appellees. Reported below: 150 S. E. 424.

No. 235. MORGAN *v.* GEORGIA. Appeal from the Supreme Court of Georgia. Submitted February 24, 1930. Decided March 3, 1930. *Per Curiam:* The appeal herein is dismissed for the want of a substantial federal question. *Griffith* v. *State of Connecticut*, 218 U. S. 563, 571; *Wabash R. R. Co.* v. *Flannigan*, 192 U. S. 29; *Erie R. R. Co.* v. *Solomon*, 237 U. S. 427; *Zucht* v. *King*, 260 U. S. 174; *Sugarman* v. *United States*, 249 U. S. 182; *C. A. King & Co.* v. *Horton*, 276 U. S. 600; *Bank of Indianola* v. *Miller*, 276 U. S. 605; *Roe* v. *Kansas*, 278 U. S. 191. *Mr. R. R. Jackson* on the brief for appellant. *Messrs. George M. Napier*, Attorney General of Georgia, *Albert Howell*, *Mark Bolding*, *Herman Heyman*, *Frank R. Hubacheck*, *Frank Brookes Hubacheck*, and *Charles Scott Kelly* on the brief for appellee. Reported below: 149 S. E. 37.

No. 538. JOHNSON ET AL. *v.* STATE HIGHWAY COMMISSION OF SOUTH CAROLINA ET AL. Appeal from the Supreme Court of South Carolina. Argued February 24, 1930. Decided March 3, 1930. *Per Curiam:* The appeal herein is dismissed for the want of a substantial federal question. *Wabash R. R. Co.* v. *Flannigan*, 192 U. S. 29; *Erie R. R. Co.* v. *Solomon*, 237 U. S. 427; *Zucht* v. *King*, 260 U. S. 174; *Sugarman* v. *United States*, 249 U. S. 182; *C. A. King & Co.* v. *Horton*, 276 U. S. 600; *Bank of Indianola* v. *Miller*, 276 U. S. 605; *Roe* v. *Kansas*, 278 U. S. 191. Treating the papers whereon the appeal was allowed as a petition for certiorari, as required by § 237 (c) of the Judicial Code, as amended by the Act of February 13,

1925 (43 Stat. 936, 938), certiorari is denied. *Mr. L. G. Southard* for appellants. *Messrs. John M. Daniel,* Attorney General of South Carolina, *Cordie Page* and *J. Ivey Humphrey,* Assistant Attorneys General, *William C. Wolfe, Mendel L. Smith, R. E. Whiting,* and *C. C. Wyche* on the brief for appellees. Reported below: 150 S. E. 269.

No. 499. CRAWFORD *v.* SUPERIOR COURT OF CALIFORNIA ET AL. Appeal from the Supreme Court of California. Argued February 24, 25, 1930. Decided March 3, 1930. *Per Curiam:* The appeal herein is dismissed for the want of a substantial federal question. *Wabash R. R. Co.* v. *Flannigan,* 192 U. S. 29; *Erie R. R. Co.* v. *Solomon,* 237 U. S. 427; *Zucht* v. *King,* 260 U. S. 174; *Sugarman* v. *United States,* 249 U. S. 182; *C. A. King & Co.* v. *Horton,* 276 U. S. 600; *Bank of Indianola* v. *Miller,* 276 U. S. 605; *Roe* v. *Kansas,* 278 U. S. 191. Treating the papers whereon the appeal was allowed as a petition for certiorari, as required by § 237 (c) of the Judicial Code, as amended by the Act of February 13, 1925 (43 Stat. 936, 938), certiorari is denied. *Mr. Casper A. Ornbaun,* with whom *Messrs. Edson Abel, William H. Hunt,* and *Herbert W. Clark* were on the brief, for appellant. *Messrs. U. S. Webb,* Attorney General of California, *Robert W. Harrison, George H. Harlan, Thomas P. Boyd,* and *Francis V. Keesling* on the brief for appellees. Reported below: 279 Pac. 992.

No. 484. TURNER *v.* WINTERS. Appeal from the Supreme Court of Utah. Jurisdictional statement submitted February 24, 1930. Decided March 3, 1930. *Per Curiam:* The appeal herein is dismissed for the want of jurisdiction. Section 237 (a), Judicial Code, as amended by the Act of February 13, 1925 (43 Stat. 936, 937).

Treating the papers whereon the appeal was allowed as a petition for certiorari as required by § 237 (c) of the Judicial Code as amended by the Act of February 13, 1925 (43 Stat. 936, 938), certiorari is denied. *Mr. Samuel A. King* for appellant. *Messrs. Charles M. Morris* and *Edward R. Callister* for appellee. Reported below: 278 Pac. 816.

No. —, original. Ex parte Smith et al. Motion submitted March 3, 1930. Decided March 12, 1930. The motion for leave to file petition for a writ of mandamus is denied. *Mr. C. C. Calhoun* for Smith et al.

No. 300. Quapaw Land Company, Inc., *v.* Bolinger. On writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit. Argued March 6, 1930. Decided March 12, 1930. *Per Curiam:* The judgment herein is set aside, and the case is remanded to the District Court with directions to dismiss the petition for the want of jurisdiction. *Taylor* v. *Anderson,* 234 U. S. 74; *Joy* v. *St. Louis,* 201 U. S. 332; *Shulthis* v. *McDougal,* 225 U. S. 561. *Mr. Sidney L. Herold,* with whom *Messrs. Francis W. Clements* and *Sumter Cousin* were on the brief, for petitioner. *Messrs. Frank J. Looney* and *Judson M. Grimmet* on the brief for respondent. Reported below: 32 F. (2d) 627.

No. 309. Exchange Drug Co. *v.* Long, Chairman of the State Tax Commission of Alabama, et al. Appeal from the Supreme Court of Alabama. Argued March 7, 1930. Decided March 12, 1930. *Per Curiam:* The appeal herein is dismissed for the want of a substantial federal question. *Wabash R. R. Co.* v. *Flannigan,* 192 U. S. 29; *Erie R. R. Co.* v. *Solomon,* 237 U. S. 427; *Zucht* v.

King, 260 U. S. 174; *Sugarman* v. *United States,* 249 U. S. 182; *C. A. King & Co.* v. *Horton,* 276 U. S. 600; *Bank of Indianola* v. *Miller,* 276 U. S. 605; *Roe* v. *Kansas,* 278 U. S. 191. *Mr. Robert Benson Evins* for appellant. *Messrs. Charlie C. McCall,* Attorney General of Alabama, *Richard T. Rives,* Special Assistant Attorney General, and *Lawrence H. Lee* on the brief for appellees. Reported below: 219 Ala. 701.

No. 6, original. OKLAHOMA *v.* TEXAS ET AL. March 17, 1930. On consideration of the report dated July 15, 1929, of Samuel S. Gannett, commissioner, heretofore designated to run, locate, and mark the boundary between the State of Oklahoma and the State of Texas along the true one hundredth meridian of longitude west from Greenwich as determined by the decree of January 3, 1927 (273 U. S. 83), modified by the decree of March 5, 1928 (276 U. S. 596), showing that he has run, located, and marked such boundary;

And no objection or exception to such report being presented, and the time therefor having expired;

It is now adjudged, ordered, and decreed as follows:

1. The said report is in all things confirmed.

2. The boundary line delineated and set forth in said report and on the accompanying maps is established and declared to be the true boundary between the States of Texas and Oklahoma along said meridian.

3. The clerk of this Court shall transmit to the chief magistrates of the States of Texas and Oklahoma and the Secretary of the Interior copies of this decree, duly authenticated under the seal of this Court, together with copies of said report and of the accompanying maps.

4. As it appears that the said commissioner has completed his work conformably to said decrees, he is hereby discharged.

5. The clerk of this Court shall distribute and deliver to the chief magistrates of the States of Texas and Oklahoma and the Secretary of the Interior all copies of the said report made by the commissioner, with the accompanying maps now in the clerk's hands, save that he shall retain 20 copies of each for purposes of certification and other needs that may arise in his office.

[This decree appears also at p. 109, *ante*.]

No. 590. DAVIS *v.* TEAGUE. Appeal from the Supreme Court of Alabama. Jurisdictional statement submitted March 12, 1930. Decided March 17, 1930. *Per Curiam:* The appeal herein is dismissed for the want of a substantial federal question. *Wabash R. R. Co.* v. *Flannigan,* 192 U. S. 29; *Erie R. R. Co.* v. *Solomon,* 237 U. S. 427; *Zucht* v. *King,* 260 U. S. 174; *Sugarman* v. *United States,* 249 U. S. 182; *C. A. King & Co.* v. *Horton,* 276 U. S. 600; *Bank of Indianola* v. *Miller,* 276 U. S. 605; *Roe* v. *Kansas,* 278 U. S. 191. *Mr. Mack C. Davis, pro se.* No appearance for appellee. Reported below: 125 So. 51.

No. 339. COLUMBUS & GREENVILLE RY. CO. *v.* BUFORD ET AL. Appeal from the Supreme Court of Mississippi. Argued March 14, 1930. Decided March 17, 1930. *Per Curiam:* The appeal herein is dismissed for the want of a properly presented substantial federal question. *Wabash R. R. Co.* v. *Flannigan,* 192 U. S. 29; *Erie R. R. Co.* v. *Solomon,* 237 U. S. 427; *Zucht* v. *King,* 260 U. S. 174; *Sugarman* v. *United States,* 249 U. S. 182; *C. A. King & Co.* v. *Horton,* 276 U. S. 600; *Bank of Indianola* v. *Miller,* 276 U. S. 605; *Roe* v. *Kansas,* 278 U. S. 191; *Sayward* v. *Denny,* 158 U. S. 180, 183, 184; *Consolidated Turnpike Co.* v. *Norfolk & Ocean View Ry. Co.,* 228 U. S. 326, 334. *Mr. William H. Watkins,* with whom *Messrs. A. F. Gardner, Sr., H. T. Odom, P. H. Eager, Jr., A. F. Gardner, Jr.,* and

J. N. Flowers were on the brief, for appellant. *Messrs. John Ambrose Tyson, A. McC. Kimbrough,* and *O. L. Kimbrough* on the brief for appellees. Reported below: 122 So. 501.

No. 7, original. WISCONSIN ET AL. *v.* ILLINOIS ET AL;
No. 11, original. MICHIGAN *v.* SAME; and
No. 12, original. NEW YORK *v.* SAME. April 21, 1930.

DECREE. Announced by MR. JUSTICE HOLMES. (The CHIEF JUSTICE took no part.)

These causes came on to be heard upon the pleadings, evidence, and the exceptions filed by the parties to the Report of the Special Master, as well as on the exceptions filed to the Report of the Special Master on Re-reference, and were argued by counsel. The Court now being fully advised in the premises, and for the purpose of carrying into effect the conclusions set forth in the opinions of this Court announced January 14, 1929, 278 U. S. 367, and April 14, 1930 [*ante,* p. 179],

It is now here ordered, adjudged, and decreed as follows:

1. On and after July 1, 1930, the defendants, the State of Illinois and the Sanitary District of Chicago, their employees and agents, and all persons assuming to act under the authority of either of them, be and they hereby are enjoined from diverting any of the waters of the Great Lakes-St. Lawrence system or watershed through the Chicago Drainage Canal and its auxiliary channels or otherwise in excess of an annual average of 6,500 cubic feet per second in addition to domestic pumpage.

2. That on and after December 31, 1935, unless good cause be shown to the contrary, the defendants, the State of Illinois and the Sanitary District of Chicago, their employees and agents, and all persons assuming to act under the authority of either of them, be and they hereby are

enjoined from diverting any of the waters of the Great Lakes-St. Lawrence system or watershed through the Chicago Drainage Canal and its auxiliary channels or otherwise in excess of an annual average of 5,000 cubic feet per second in addition to domestic pumpage.

3. That on and after December 31, 1938, unless good cause be shown to the contrary, the defendants, the State of Illinois and the Sanitary District of Chicago, their employees and agents, and all persons assuming to act under the authority of either of them, be and they hereby are enjoined from diverting any of the waters of the Great Lakes-St. Lawrence system or watershed through the Chicago Drainage Canal and its auxiliary channels or otherwise in excess of the annual average of 1,500 cubic feet per second in addition to domestic pumpage.

4. That the provisions of this decree as to the diverting of the waters of the Great Lakes-St. Lawrence system or watershed relate to the flow diverted by the defendants exclusive of the water drawn by the City of Chicago for domestic water supply purposes and entering the Chicago River and its branches or the Calumet River or the Chicago Drainage Canal as sewage. The amount so diverted is to be determined by deducting from the total flow at Lockport the amount of water pumped by the City of Chicago into its water mains and as so computed will include the run-off of the Chicago and Calumet drainage area.

5. That the defendant the Sanitary District of Chicago shall file with the clerk of this Court semi-annually on July first and January first of each year, beginning July first, 1930, a report to this Court adequately setting forth the progress made in the construction of the sewage treatment plants and appurtenances outlined in the program as proposed by the Sanitary District of Chicago, and also setting forth the extent and effects of the operation of the sewage treatment plants, respectively, that

shall have been placed in operation, and also the average diversion of water from Lake Michigan during the period from the entry of this decree down to the date of such report.

6. That on the coming in of each of said reports, and on due notice to the other parties, any of the parties to the above entitled suits, complainants or defendants, may apply to the Court for such action or relief, either with respect to the time to be allowed for the construction, or the progress of construction, or the methods of operation, of any of said sewage treatment plants, or with respect to the diversion of water from Lake Michigan, as may be deemed to be appropriate.

7. That any of the parties hereto, complainants or defendants, may, irrespective of the filing of the above-described reports, apply at the foot of this decree for any other or further action or relief, and this Court retains jurisdiction of the above-entitled suits for the purpose of any order or direction, or modification of this decree, or any supplemental decree, which it may deem at any time to be proper in relation to the subject matter in controversy.

And it is further ordered that the costs in these cases shall be taxable against the defendants.

No. —, original. Ex parte Benjamin. Motion submitted April 14, 1930. Decided April 21, 1930. The motion for leave to file petition for a writ of *habeas corpus* is denied. *Mr. Jehudah Benjamin, pro se.*

No. 525. Cox *v.* Colorado et al.; and

No. 526. Same *v.* Same. Appeals from the District Court of the United States for the District of Colorado. Jurisdictional statement submitted April 14, 1930. Decided April 21, 1930. *Per Curiam:* Appeals dismissed for

the want of jurisdiction, upon the authority of § 238 of the Judicial Code, as amended by the Act of February 13, 1925 (c. 229, 43 Stat. 938.) *Messrs. James H. Brown* and *M. W. Spaulding* for appellant. *Messrs. Colin A. Smith* and *J. G. Scott* for appellees.

No. 486. SHERMAN ET AL. *v.* UNITED STATES. Certificate from the Circuit Court of Appeals for the Ninth Circuit. Motion submitted April 28, 1930. Decided May 5, 1930. The motion for a writ of certiorari to bring up the entire record and cause is granted. *Mr. Leon E. Morris* for Sherman et al. *Solicitor General Thacher* for the United States.

No. 462. LUCAS, COMMISSIONER OF INTERNAL REVENUE, *v.* REED. On writ of certiorari to the Circuit Court of Appeals for the Third Circuit. Argued April 30, May 1, 1930. Decided May 5, 1930. *Per Curiam:* Judgment reversed upon the authority of *Lucas* v. *Howard,* 280 U. S. 526, and *Metcalf & Eddy* v. *Mitchell,* 269 U. S. 514. *Mr. Claude R. Branch,* with whom *Attorney General Mitchell, Assistant Attorney General Youngquist, Mr. Sewall Key, Helen R. Carloss,* and *Messrs. Clarence M. Charest* and *Shelby S. Faulkner* were on the brief, for petitioner. *Mr. Maynard Teall* for respondent. Reported below: 34 F. (2d) 263.

No. 670. IVEY ET AL. *v.* KEELING ET AL. Appeal from the Court of Civil Appeals, Eleventh Supreme Judicial District, of Texas. Jurisdictional statement submitted April 28, 1930. Decided May 5, 1930. *Per Curiam:* The appeal herein is dismissed for the want of a substantial federal question. *Hancock* v. *City of Muskogee,* 250 U. S.

454; *Valley Farms Co.* v. *County of Westchester,* 261 U. S. 155; *Browning* v. *Hooper,* 269 U. S. 396, 405. *Mr. Thomas E. Hayden, Jr.,* for appellants. No appearance for appellees. Reported below: 15 S. W. (2d) 1097.

No. 674. HOLMES *v.* CITY OF FAYETTEVILLE. Appeal from the Supreme Court of North Carolina. Jurisdictional statement submitted April 28, 1930. Decided May 5, 1930. *Per Curiam:* The appeal herein is dismissed for the want of a substantial federal question. *Yamhill Electric Co.* v. *City of McMinnville,* 280 U. S. 531; *Wabash R. R. Co.* v. *Flannigan,* 192 U. S. 29; *Erie R. R. Co.* v. *Solomon,* 237 U. S. 427; *Zucht* v. *King,* 260 U. S. 174; *Sugarman* v. *United States,* 249 U. S. 182; *C. A. King Co.* v. *Horton,* 276 U. S. 600; *Bank of Indianola* v. *Miller,* 276 U. S. 605; *Roe* v. *Kansas,* 278 U. S. 191. *Mr. A. L. Brooks* for appellant. No appearance for appellee. Reported below: 197 N. C. 740.

No. 16, original. KENTUCKY *v.* INDIANA ET AL. May 19, 1930.

DECREE.

This cause came on to be heard upon the pleadings, stipulation of facts, and briefs and was argued by counsel. The Court now being fully advised in the premises, and for the purpose of carrying into effect the conclusion set forth in the opinion of this Court announced April 14, 1930, *ante,* p. 163,

It is now here ordered, adjudged, and decreed as follows:

1. That the bill of complaint as amended be, and it hereby is, dismissed as against the individual defendants, James Duane Duncan, Claude F. Johnson, Walter L. Brandt, Robert N. Losey, Frank H. Hatfield, Todd

Stoops, John F. Carson, Robert E. Rogers, and Lester R. McCool.

2. That the defendant, the State of Indiana, and each of its officers, agents, and servants, and all persons assuming to act under authority of either of them, be, and they hereby are, enjoined from delaying, attempting to delay, failing or refusing to promptly and in good faith perform or cause to be performed the covenants, on the part of the State of Indiana to be performed, of the agreement made and entered into by and between the Commonwealth of Kentucky, through and by the State Highway Commission of Kentucky, and the State of Indiana, through and by the Indiana State Highway Commission, of date September 12, 1928, which provides for the construction by the State of Indiana of a bridge across the Ohio River between Evansville, Indiana, and Henderson, Kentucky, at the point designated in the plans and specifications referred to in said contract.

3. That the defendant, the State of Indiana, its officers, agents, servants, and all persons assuming to act under the authority of either of them, be, and they hereby are, directed to immediately resume, in good faith, the performance of each and all of the covenants of said contract, on its part to be performed, according to its terms, and to continue the performance thereof until each and all of said covenants shall have been fully performed.

4. That the defendant, the State of Indiana, through and by its State Highway Commission, shall proceed at once with the completion of the plans and specifications for said bridge, and shall advertise and let a contract or contracts for the construction thereof as soon as practicable after the Commonwealth of Kentucky shall have made permanently available sufficient funds to pay its part of the cost of said bridge as provided in said contract, of date September 12, 1928. The said Indiana State Highway Commission hereby is expressly directed to act

and proceed for and on behalf of the State of Indiana in promptly and expeditiously complying with the terms of this decree.

5. That the defendant, the State of Indiana, by and through its State Highway Commission, shall file with the Clerk of this Court semi-annually on September 1st and March 1st of each year, beginning September 1, 1930, a report to this Court adequately setting forth the progress made in the construction of said bridge and in the performance of the covenants of said contract on the part of the State of Indiana to be performed during the period from the entry of this decree down to the date of such report.

6. That the complainant, Commonwealth of Kentucky, may, irrespective of the filing of the described reports, apply to this Court for any further action or relief, and this Court retains jurisdiction of the above entitled suit for the purpose of any order or direction, or modification of this decree, or any supplemental decree, which it may deem at any time to be proper in relation to the subject matter in controversy.

And it is further ordered that the costs in this case shall be taxable one-half against the State of Indiana and one-half against the Commonwealth of Kentucky.

No. 744. LAWS *v.* DAVIS ET AL. Appeal from the Supreme Court of Ohio. Jurisdictional statement submitted May 5, 1930. Decided May 19, 1930. *Per Curiam:* The appeal is dismissed for the reason that the judgment of the state court sought here to be reviewed is based on a non-federal ground adequate to support it. *Bilby* v. *Stewart,* 246 U. S. 255, 257; *Dibble* v. *Bellingham Bay Land Company,* 163 U. S. 63. *Mr. Walter A. DeCamp* for appellant. *Mr. John Weld Peck* for appellees. Reported below: 34 Oh. App. 157.

No. 795. ISAACS, TRUSTEE IN BANKRUPTCY, *v.* HOBBS TIE & TIMBER CO. On certificate from the Circuit Court of Appeals for the Eighth Circuit. May 19, 1930. The motion for a writ of certiorari to bring up the entire record and cause is granted. *Mr. Thomas J. Reilly* submitted the motion in behalf of *Mr. William R. Watkins* for Isaacs. No appearance for the Hobbs Tie & Timber Company.

No. 490. SLEMP *v.* CITY OF TULSA ET AL. Appeal from the Supreme Court of Oklahoma. Argued May 5, 1930. Decided May 19, 1930. *Per Curiam:* Appeal dismissed for the want of jurisdiction. Section 237 (a), Judicial Code, as amended by the Act of February 13, 1925 (43 Stat. 936, 937). Treating the papers whereon the appeal was allowed as a petition for writ of certiorari, as required by § 237 (c), Judicial Code, as amended (43 Stat. 936, 938), certiorari is denied. *Mr. Richard K. Bridges,* with whom *Messrs. Randolph Shirk, John A. Haver,* and *H. W. Randolph* were on the brief, for appellant. *Messrs. Thomas D. Lyons,* City Solicitor of Tulsa, *M. C. Spradling,* City Attorney, *Conn Linn, Eben L. Taylor,* and *Felix A. Bodovitz* on the brief for the City of Tulsa. *Messrs. Philip Kates* and *Nathan A. Gibson* on the brief for King et al. Reported below: 139 Okla. 76.

No. 723. SOUTHWEST POWER CO. *v.* PRICE, ADMINISTRATRIX. Appeal from the Supreme Court of Arkansas. Jurisdictional statement submitted May 5, 1930. Decided May 19, 1930. *Per Curiam:* Appeal dismissed for the want of jurisdiction. Section 237 (a), Judicial Code, as amended by the Act of February 13, 1925 (43 Stat. 936, 937). (Certiorari denied, *post,* p. 753.) *Messrs. James B. McDonough, J. H. Evans,* and *Frank M. Kemp* for appellant. *Messrs. W. H. Fuller, George M. Porter,* and

Harry P. Warner for appellee. Reported below: 22 S. W. (2d) 373.

No. 729. CITY OF RICHMOND ET AL. *v.* DEANS. Appeal from the Circuit Court of Appeals for the Fourth Circuit. Jurisdictional Statement submitted May 5, 1930. Decided May 19, 1930. *Per Curiam:* Decree affirmed. *Buchanan* v. *Warley,* 245 U. S. 60; *Harmon* v. *Tyler,* 273 U. S. 668. *Mr. James E. Cannon* for appellants. *Mr. Alfred E. Cohen* for respondent. Reported below: 37 F. (2d) 712.

No. 492. POE, COLLECTOR OF INTERNAL REVENUE, *v.* SEABORN. On certificate from the Circuit Court of Appeals for the Ninth Circuit. May 26, 1930. The joint motion for a writ of certiorari to bring up the entire record and cause is granted. *Solicitor General Thacher* for Poe. *Messrs. George Donworth, Elmer E. Todd,* and *Frank E. Hohman* for Seaborn.

No. 882. GOODELL, COLLECTOR OF INTERNAL REVENUE, *v.* KOCH. On certificate from the Circuit Court of Appeals for the Ninth Circuit. May 26, 1930. The joint motion for a writ of certiorari to bring up the entire record and cause is granted. *Solicitor General Thacher* for Goodell. *Messrs. E. E. Ellenwood* and *Blaine B. Shimmel* for Koch.

No. 753. SLOMAN, INDIVIDUALLY AND AS EXECUTRIX, *v.* SECURITY TRUST CO., TRUSTEE. Appeal from the Supreme Court of Michigan. Jurisdictional statement submitted May 19, 1930. Decided May 26, 1930. *Per Curiam:* Appeal dismissed for the want of a substantial federal question. *Merrick* v. *N. W. Halsey & Co.,* 242 U. S. 658; *Hall* v. *Geiger-Jones Company,* 242 U. S. 539.

Mr. George E. Brand for appellant. *Messrs. William L. Carpenter* and *Thomas G. Long* for appellee. Reported below: 248 Mich. 527.

No. —, original. EX PARTE SALISBURY. June 2, 1930. The motion for leave to file petition for writ of mandamus is denied. *Adele Salisbury, pro se.*

No. 852. GAMBLE *v.* DANIEL, RECEIVER. Appeal from the Circuit Court of Appeals for the Eighth Circuit. Jurisdictional statement submitted May 26, 1930. Decided June 2, 1930. *Per Curiam:* The appeal herein is dismissed for want of jurisdiction. Judicial Code, § 240(b) as amended by the Act of February 13, 1925 (43 Stat. 936, 939). The motion for an extension of time within which to file petition for writ of certiorari is denied. *Messrs. Francis A. Brogan, C. A. Sorensen,* and *Edgar M. Morsman, Jr.,* for appellant. *Messrs. Arthur F. Mullen* and *Paul L. Martin* for appellee. Reported below: 39 F. (2d) 447.

No. 760. FULLERTON *v.* OKLAHOMA EX REL. COMMISSIONERS OF THE LAND OFFICE. Appeal from the Supreme Court of Oklahoma. Jurisdictional statement submitted May 26, 1930. Decided June 2, 1930. *Per Curiam:* Appeal dismissed for the want of jurisdiction. Judicial Code, § 237 (a) as amended by the Act of February 13, 1925 (43 Stat. 936, 937). Treating the papers whereon the appeal was allowed as a petition for a writ of certiorari, as required by the Judicial Code, § 237 (c) as amended (43 Stat. 936, 938), certiorari is denied. *Mr. P. G. Fullerton, pro se. Mr. George E. Merritt* for appellee. Reported below: 140 Okla. 122.

No. 832. GOTHAM CAN CO. *v.* UNITED STATES. On petition for writ of certiorari to the Court of Claims. Petition submitted May 26, 1930. Decided June 2, 1930. *Per Curiam:* The petition for a writ of certiorari is dismissed for the want of jurisdiction, because of failure to file the petition within the time prescribed by statute. *United States* v. *Lippman, Spier & Hahn,* 260 U. S. 739; *Hooper* v. *United States,* 274 U. S. 743; *Rust Land & Lumber Co.* v. *Jackson,* 250 U. S. 71, 76. *Mr. Joseph R. Little* for petitioner. *Solicitor General Thacher, Assistant Attorney General Rugg,* and *Mr. Claude R. Branch* for the United States. Reported below: 37 F. (2d) 793.

No. 944. GREAT LAKES BROADCASTING CO. *v.* FEDERAL RADIO COMMISSION;

No. 945. VOLIVA *v.* SAME; and

No. 946. AGRICULTURAL BROADCASTING CO. v. SAME. On petition for writs of certiorari to the Court of Appeals of the District of Columbia. June 2, 1930. *Per Curiam.* The petition for writs of certiorari in these cases is dismissed. *Federal Radio Commission* v. *General Electric Company et al., ante,* p. 464. *Messrs. Harry Eugene Kelly, Thornton M. Pratt,* and *Carl H. Zeiss* for petitioners. *Solicitor General Thacher, Assistant to the Attorney General O'Brian,* and *Mr. Claude R. Branch* for respondent. Reported below: 37 F. (2d) 993.

PETITIONS FOR CERTIORARI GRANTED, FROM JANUARY 28, 1930, TO AND INCLUDING JUNE 2, 1930.

No. 556. CROOKS, COLLECTOR OF INTERNAL REVENUE, *v.* HARRELSON. February 24, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit granted. *Assistant Attorney General Youngquist*

and *Messrs. Sewall Key* and *John Vaughan Groner* for petitioner. *Messrs. Frank S. Bright* and *S. L. Swarts* for respondent. Reported below: 35 F. (2d) 416.

No. 569. DAVIES MOTORS, INC., *v.* UNITED STATES. February 24, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *Messrs. Duane R. Dills* and *William K. Young* for petitioner. *Assistant Attorney General Youngquist* and *Messrs. Claude R. Branch* and *Mahlon D. Kiefer* for the United States. Reported below: 35 F. (2d) 928.

No. 555. UNITED STATES *v.* NORRIS. March 3, 1930. The petition for a writ of certiorari to the Circuit Court of Appeals for the Third Circuit is granted. *Assistant Attorney General Youngquist* and *Messrs. John J. Byrne* and *Mahlon D. Kiefer* for the United States. *Mr. Frederic L. Ballard* for respondent. Reported below: 34 F. (2d) 839.

No. 554. STANGE *v.* UNITED STATES. March 3, 1930. The petition for a writ of certiorari to the Court of Claims in this cause is granted, with the limitation, however, that counsel shall confine themselves, in the briefs and in oral argument, to the questions involving the validity and effect of the waiver of the statute of limitations executed in this cause. *Mr. W. W. Spalding* for petitioner. *Assistant Attorney General Youngquist* and *Messrs. Claude R. Branch, Morton Poe Fisher, Joseph H. Sheppard,* and *W. Marvin Smith* for the United States. Reported below: 68 Ct. Cls. 395.

No. 579. LUCAS, COMMISSIONER OF INTERNAL REVENUE, *v.* SANFORD & BROOKS CO. March 3, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the

Fourth Circuit granted. *Assistant Attorney General Youngquist, Helen R. Carloss,* and *Messrs. J. Louis Monarch, Clarence M. Charest,* and *Prew Savoy* for petitioner. *Messrs. Charles McH. Howard* and *Harry N. Baetjer* for respondent. Reported below: 35 F. (2d) 312.

No. 581. URAVIC, ADMINISTRATRIX, *v.* F. JARKA CO., INC., ET AL. March 3, 1930. Petition for writ of certiorari to the Supreme Court of New York granted. *Messrs. Vernon S. Jones* and *Paul C. Matthews* for petitioner. *Mr. Ernic Adamson* for respondents. Reported below: 252 N. Y. 530.

No. 589. GRAHAM AND FOSTER, COPARTNERS, *v.* GOODCELL, FORMER COLLECTOR. March 3, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *Mr. John E. Hughes* for petitioners. *Attorney General Mitchell, Assistant Attorney General Youngquist,* and *Messrs. Claude R. Branch, Sewall Key,* and *J. Louis Monarch* for respondent. Reported below: 35 F. (2d) 586.

No. 650. ENSTEN ET AL. *v.* SIMON ASCHER & CO., INC. March 12, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Mr. O. Ellery Edwards* for petitioners. No appearance for respondent. Reported below: 38 F. (2d) 71.

No. 617. LANGNES *v.* GREEN. March 12, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *Messrs. Ira Bronson* and *H. B. Jones* for petitioner. *Messrs. Winter S. Martin* and *Samuel B. Bassett* for respondent. Reported below: 35 F. (2d) 447.

No. 628. ALWARD *v.* JOHNSON, TREASURER OF CALIFORNIA. March 17, 1930. Petition for writ of certiorari to the Supreme Court of California granted. *Mr. Burke Corbet* for petitioner. *Mr. U. S. Webb,* Attorney General of California, for respondent. Reported below: 281 Pac. 389.

No. 632. UNITED STATES *v.* BOSTON BUICK CO.; and No. 633. SAME *v.* IRON CAP COPPER CO. March 17, 1930. Petition for writs of certiorari to the Circuit Court of Appeals for the First Circuit granted. *Assistant Attorney General Youngquist, Helen R. Carloss, Messrs. Clarence M. Charest* and *R. E. Smith* for the United States. *Messrs. Robert N. Miller* and *Charles W. Mulcahy* for Boston Buick Company. *Mr. Burton E. Eames* for Iron Cap Copper Company. Reported below: 35 F. (2d) 560.

No. 700. UNITED STATES *v.* SWIFT & CO. March 17, 1930. Petition for writ of certiorari to the Court of Claims granted. *Attorney General Mitchell* for the United States. *Mr. G. Carroll Todd* for respondent. Reported below: 68 Ct. Cls. 97; 38 F. (2d) 365.

No. 664. FULLERTON LUMBER CO. *v.* CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC R. CO. March 17, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit granted. *Mr. Stanley S. Gillam* for petitioner. *Messrs. F. W. Root, A. C. Erdall,* and *O. W. Dynes* for respondent. Reported below: 36 F. (2d) 180.

No. 667. AMERICAN FRUIT GROWERS, INC., *v.* BROGDEX CO. March 17, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit

granted. *Mr. R. T. M. McCready* for petitioner. *Messrs. Melville Church, Charles Neave,* and *Roy F. Steward* for respondent. Reported below: 35 F. (2d) 106.

No. 717. ORENSTEIN & KOPPEL AKTIENGESELLSCHAFT *v.* KOPPEL INDUSTRIAL CAR & EQUIPMENT CO. March 17, 1930. Petition for writ of certiorari to the Court of Appeals of the District of Columbia granted. *Messrs. Dean Hill Stanley, Arthur Garfield Hays,* and *Wm. Cattron Rigby* for petitioner. *Messrs. Charles Henry Butler, John A. Kratz,* and *Godfrey L. Munter* for respondent. Reported below: 38 F. (2d) 532.

No. 598. INTERNATIONAL PAPER CO. *v.* UNITED STATES. April 14, 1930. Petition for writ of certiorari to the Court of Claims granted. *Messrs. John W. Davis* and *Montgomery B. Angell* for petitioner. *Attorney General Mitchell, Assistant Attorney General Rugg,* and *Mr. George C. Butte* for the United States. Reported below: 68 Ct. Cls. 414.

No. 673. WISCONSIN ELECTRIC CO. *v.* DUMORE CO. April 14, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit granted. *Messrs. George Bayard Jones, Walter F. Murray,* and *Greer Marechal* for petitioner. No appearance for respondent. Reported below: 35 F. (2d) 555.

No. 683. LUCAS, COMMISSIONER OF INTERNAL REVENUE, *v.* WILLINGHAM LOAN & TRUST CO. April 14, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit granted. *Attorney General Mitchell, Assistant Attorney General Youngquist, Messrs. Harvey R. Gamble,* and *Clarence M. Charest* for petitioner. *Mr. J. C. Murphy* for respondent. Reported below: 36 F. (2d) 49.

No. 704. STORY PARCHMENT CO. *v.* PATERSON PARCHMENT PAPER CO. ET AL. April 14, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit granted. *Mr. Edward O. Proctor* for petitioner. *Mr. Edward F. McClennen* for respondents. Reported below: 37 F. (2d) 537.

No. 623. RUSSIAN VOLUNTEER FLEET *v.* UNITED STATES. April 21, 1930. Petition for writ of certiorari to the Court of Claims granted. *Messrs. Charles Recht* and *Horace S. Whitman* for petitioner. *Attorney General Mitchell, Assistant Attorney General Rugg, Messrs. Claude R. Branch, and Henry A. Cox* for the United States. Reported below: 68 Ct. Cls. 32.

No. 625. FAWCUS MACHINE CO. *v.* UNITED STATES. April 21, 1930. Petition for writ of certiorari to the Court of Claims granted. *Mr. J. S. Y. Ivins* for petitioner. *Attorney General Mitchell, Assistant Attorney General Rugg, Messrs. Claude R. Branch,* and *Joseph H. Sheppard* for respondent. Reported below: 68 Ct. Cls. 784.

No. 675. SARANAC AUTOMATIC MACHINE CORP. *v.* WIREBOUNDS PATENTS CO. ET AL. April 21, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit granted. *Messrs. A. C. Paul* and *Howard M. Cox* for petitioner. *Mr. Edward G. Curtis* for respondents. Reported below: 37 F. (2d) 830.

No. 695. CARBICE CORPORATION OF AMERICA *v.* AMERICAN PATENTS DEVELOPMENT CORP. ET AL. April 21, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Mr. Samuel E. Darby, Jr.,* for petitioner. *Messrs. Charles Neave, George*

C. Dean, and *Clarence D. Kerr* for respondents. Reported below: 38 F. (2d) 62.

No. 715. OXFORD PAPER CO. *v.* THE NIDARHOLM. April 28, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit granted. *Mr. John W. Lawrence* for petitioner. No appearance for respondent. Reported below: 34 F. (2d) 442; 36 F. (2d) 227.

No. 719. NAUTS, COLLECTOR OF INTERNAL REVENUE, *v.* SLAYTON. April 28, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit granted. *Attorney General Mitchell, Assistant Attorney General Youngquist, Messrs. Sewall Key, Andrew D. Sharpe, Clarence M. Charest,* and *T. H. Lewis, Jr.,* for petitioner. *Messrs. E. J. Marshall* and *Thomas O. Marlar* for respondent. Reported below: 36 F. (2d) 145.

No. 741. LUCAS, COMMISSIONER OF INTERNAL REVENUE, *v.* NIAGARA FALLS BREWING CO. ET AL. April 28, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Attorney General Mitchell, Assistant Attorney General Youngquist, Messrs. Sewall Key, Norman D. Keller,* and *Clarence M. Charest* for petitioner. *Mr. Basil Robillard* for respondents. Reported below: 38 F. (2d) 217.

No. 768. INTERSTATE COMMERCE COMMISSION *v.* NORTHERN PACIFIC R. CO. ET AL. May 5, 1930. Petition for writ of certiorari to the Court of Appeals of the District of Columbia granted. *Messrs. Daniel W. Knowlton* and *Nelson Thomas* for petitioner. *Messrs. R. J. Hag-*

man, D. F. Lyons, W. W. Millan, R. E. L. Smith, and *F. G. Dorety* for respondents. Reported below: 39 F. (2d) 508.

No. 772. MILLER BROTHERS CO. *v.* LEKTOPHONE CORP. May 5, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit granted. *Mr. Samuel E. Darby, Jr.,* for petitioner. *Messrs. William H. Davis* and *R. Morton Adams* for respondent.

No. 800. UNITED STATES *v.* LA FRANCA. May 5, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit granted. *Attorney General Mitchell, Assistant Attorney General Youngquist, Messrs. John J. Byrne* and *Paul D. Miller* for the United States. *Mr. E. Howard McCaleb* for respondent. Reported below: 37 F. (2d) 269.

No. 777. AIKEN, ADMINISTRATRIX, *v.* LUCAS, COMMISSIONER OF INTERNAL REVENUE. May 5, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit in this case is granted, limited to the questions concerning the validity and effect of the waivers. *Mr. L. Karlton Mosteller* for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist, Messrs. Claude R. Branch* and *J. Louis Monarch* for respondent. Reported below: 35 F. (2d) 620.

No. 761. MAGEE *v.* UNITED STATES. May 19, 1930. The petition for a writ of certiorari in this case is granted, limited to the question of the effect and validity of § 611, Revenue Act, 1928. *Mr. Theodore B. Benson* for petitioner. *Solicitor General Thacher, Assistant Attorney*

General Rugg, Messrs. Claude R. Branch and *Lisle A. Smith* for the United States. Reported below: 37 F. (2d) 763.

No. 809. SMITH, ADMINISTRATRIX, *v.* MAGIC CITY KENNEL CLUB, INC. May 19, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit granted. *Mr. E. Howard McCaleb* for petitioner. No appearance for respondent. Reported below: 38 F. (2d) 170.

No. 810. MOTT *v.* UNITED STATES. May 19, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit granted. *Mr. Charles B. Rogers* for petitioner. *Solicitor General Thacher, Assistant Attorney General Richardson, Messrs. Claude R. Branch, Nat M. Lacy,* and *W. Marvin Smith* for the United States. Reported below: 37 F. (2d) 860.

No. 812. UNITED STATES *v.* MICHEL; and

No. 813. SAME *v.* KRIEGER. May 19, 1930. Petition for writs of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Attorney General Mitchell, Assistant Attorney General Youngquist* and *Messrs. J. Louis Monarch* and *Barham R. Gary* for the United States. *Mr. Donald Horne* for respondents. Reported below: 37 F. (2d) 38.

No. 815. CHOTEAU *v.* LUCAS, COMMISSIONER OF INTERNAL REVENUE. May 19, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit granted. *Messrs. James H. Maxey, T. J. Leahy,* and *C. S. MacDonald* for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist, Messrs. Claude R. Branch, Sewall Key,* and *Morton Poe Fisher* for respondent. Reported below: 38 F. (2d) 976.

No. 821. HOPKINS, COLLECTOR, *v.* BACON. May 26, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit granted. *Solicitor General Thacher* for petitioner. No appearance for respondent. Reported below: 38 F. (2d) 651.

No. 823. BENDER, COLLECTOR, *v.* PFAFF. May 26, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit granted. *Solicitor General Thacher* for petitioner. No appearance for respondent. Reported below: 38 F. (2d) 649.

No. 792. ADAM *v.* NEW YORK TRUST CO., TRUSTEE. May 26, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit granted. *Mr. Michael Adam, pro se.* No appearance for respondent. Reported below: 37 F. (2d) 826.

No. 754. DIRECTOR OF THE LANDS OF THE PHILIPPINE ISLANDS *v.* VILLA-ABRILLE ET AL. May 26, 1930. Petition for writ of certiorari to the Supreme Court of the Philippine Islands granted. *Messrs. William Cattron Rigby, A. R. Stallings,* and *Edward A. Kreger* for petitioner. No appearance for respondents.

No. 822. UNITED STATES *v.* MUNSON S. S. LINE. May 26, 1930. Petition for writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit granted. *Attorney General Mitchell, Assistant to the Attorney General O'Brian* and *Messrs. Claude R. Branch* and *Charles H. Weston* for the United States. *Messrs. Frank Lyon, Irving L. Evans,* and *W. Calvin Chesnut* for respondent. Reported below: 37 F. (2d) 681.

No. 844. O'CONNELL *v.* UNITED STATES. May 26, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Messrs. Wilton J. Lambert, David V. Cahill,* and *Neile F. Towner* for petitioner. *Solicitor General Thacher, Assistant Attorney General Luhring, Messrs. Claude R. Branch, Harry S. Ridgely,* and *W. Marvin Smith* for the United States. Reported below: 40 F. (2d) 201.

No. 847. PHILIPPIDES *v.* DAY, COMMISSIONER OF IMMIGRATION. May 26, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Mr. Thomas A. Kane* for petitioner. *Solicitor General Thacher, Assistant Attorney General Luhring, Messrs. Claude R. Branch, Harry S. Ridgely,* and *W. Marvin Smith* for respondent. Reported below: 37 F. (2d) 1015.

No. 857. DISTRICT OF COLUMBIA *v.* COLTS. May 26, 1930. Petition for writ of certiorari to the Court of Appeals of the District of Columbia granted. *Messrs. William W. Bride, Robert E. Lynch,* and *Robert P. Reeder* for petitioner. No appearance for respondent. Reported below: 38 F. (2d) 535.

No. 746. DAILY PANTAGRAPH, INC., *v.* UNITED STATES. June 2, 1930. Petition for writ of certiorari to the Court of Claims granted, limited to the question of the reduction of invested capital by reason of dividends paid, being the third question presented in the petition for the writ. *Mr. Arnold L. Guesmer* for petitioner. *Solicitor General Thacher, Assistant Attorney General Rugg,* and *Messrs. Claude R. Branch* and *Joseph H. Sheppard* for the United States. Reported below: 37 F. (2d) 783.

No. 880. Oak Worsted Mills *v.* United States. June 2, 1930. Petition for writ of certiorari to the Court of Claims granted, limited to the question of the validity and effect of § 611 of the Revenue Act of 1928. *Messrs. Theodore B. Benson* and *William Meyerhoff* for petitioner. *Solicitor General Thacher, Assistant Attorney General Rugg,* and *Mr. Claude R. Branch* for the United States. Reported below: 38 F. (2d) 699; 36 F. (2d) 529.

No. 881. Taft Woolen Co. *v.* United States. June 2, 1930. Petition for writ of certiorari to the Court of Claims granted, limited to the question of the validity and effect of § 611 of the Revenue Act of 1928. *Messrs. Theodore B. Benson* and *William Meyerhoff* for petitioner. *Solicitor General Thacher, Assistant Attorney General Rugg,* and *Mr. Claude R. Branch* for the United States. Reported below: 38 F. (2d) 704.

No. 887. Lucas, Commissioner, *v.* National Industrial Alcohol Co., Inc. June 2, 1930. Petition for writ of certiorari to the Court of Appeals of the District of Columbia granted. *Solicitor General Thacher, Assistant Attorney General Youngquist, Messrs. Sewall Key, John G. Remey, Clarence M. Charest,* and *Robert L. Williams* for petitioner. *Mr. R. M. O'Hara* for respondent. Reported below: 38 F. (2d) 718.

No. 892. Pottstown Iron Co. *v.* United States. June 2, 1930. Petition for writ of certiorari to the Court of Claims granted. *Messrs. Paul F. Myers* and *John R. Yates* for petitioner. *Solicitor General Thacher, Assistant Attorney General Rugg, Messrs. Claude R. Branch, Charles R. Pollard,* and *Bradley B. Gilman* for the United States. Reported below: 69 Ct. Cls. 427.

No. 895. W. P. Brown & Sons Lumber Co. *v.* Commissioner of Internal Revenue. June 2, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit granted, limited to the question of the validity and effect of the waivers. *Mr. W. W. Spalding* for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist, Messrs. Claude R. Branch, J. Louis Monarch,* and *John G. Remey* for respondent. Reported below: 38 F. (2d) 425.

No. 907. Franc-Strohmenger-Cowan, Inc., *v.* Payette Neckwear Co. June 2, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit granted. *Messrs. Clifford E. Dunn, Holland S. Duell, Frederick P. Fish,* and *Charles Neave* for petitioner. *Mr. W. B. Kerkam* for respondent. Reported below: 39 F. (2d) 899.

No. 817. Alabama *v.* United States. June 2, 1930. Petition for writ of certiorari to the Court of Claims granted. *Messrs. Charlie C. McCall, Thomas E. Knight, Jr.,* and *A. A. Evans* for petitioner. *Solicitor General Thacher, Assistant Attorney General Rugg* and *Messrs. Claude R. Branch* and *William J. Hughes* for the United States. Reported below: 38 F. (2d) 897.

No. 851. New York Life Insurance Co. *v.* Bowers, Collector; and

No. 949. Bowers, Collector, *v.* New York Life Insurance Co. June 2, 1930. Petitions for writs of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Mr. James H. McIntosh* for the New

York Life Insurance Company. *Solicitor General Thacher* and *Mr. Claude R. Branch* for Bowers. Reported below: 39 F. (2d) 556.

No. 890. GO-BART IMPORTING CO. ET AL. *v.* UNITED STATES. June 2, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Mr. Charles Dickerman Williams* for petitioners. *Solicitor General Thacher, Assistant Attorney General Youngquist, Messrs. Claude R. Branch, Mahlon D. Kiefer,* and *W. Marvin Smith* for the United States. Reported below: 40 F. (2d) 593.

No. 896. UNITED STATES *v.* FELT & TARRANT MFG. CO. June 2, 1930. Petition for writ of certiorari to the Court of Claims granted. *Solicitor General Thacher* for the United States. *Messrs. Thomas G. Haight, Robert H. Montgomery,* and *J. Marvin Haynes* for respondent. Reported below: 37 F. (2d) 977.

No. 905. FIRST NATIONAL BANK OF CHICAGO *v.* UNITED STATES. June 2, 1930. Petition for writ of certiorari to the Court of Claims granted. *Mr. Harold V. Amberg* for petitioner. *Solicitor General Thacher, Assistant Attorney General Rugg, Messrs. Claude R. Branch, George H. Foster,* and *Paul D. Miller* for the United States. Reported below: 38 F. (2d) 925.

PETITIONS FOR CERTIORARI DENIED, FROM JANUARY 28, 1930, TO AND INCLUDING JUNE 2, 1930.*

No. 597. VINCENT *v.* UNITED STATES. February 24, 1930. Petition for writ of certiorari to the Court of Appeals of the District of Columbia, and motion for leave to proceed *in forma pauperis*, denied. *Mr. James Conlon* for petitioner. *Messrs. Claude R. Branch, J. Frank Staley, W. Marvin Smith,* and *W. Clifton Stone* for the United States. Reported below: 37 F. (2d) 824.

No. 600. MORRISON *v.* THE WARDEN OF THE U. S. PENITENTIARY, ATLANTA, GEORGIA. February 24, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit, and motion for leave to proceed *in forma pauperis*, denied. *Mr. James Morrison, pro se.* No appearance for respondent. Reported below: 35 F. (2d) 1019.

No. 501. DROPPS *v.* UNITED STATES. February 24, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Charles E. Dropps, pro se. Assistant Attorney General Youngquist* and *Mr. Claude R. Branch* for the United States. Reported below: 34 F. (2d) 15.

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* Certiorari was also denied in connection with other action in the following cases reported elsewhere in this volume: *Home Insurance Co.* v. *Dick*, p. 397; *Ex parte Murray*, p. 689; *Grant* v. *Glynn Canning Co.*, p. 690; *Johnson* v. *State Highway Commission of South Carolina*, p. 691; *Crawford* v. *Superior Court of California*, p. 692; *Turner* v. *Winters*, p. 692; *Slemp* v. *Tulsa*, p. 703; *Fullerton* v. *Oklahoma ex rel. Commissioners of the Land Office of Oklahoma*, p. 705; *Gotham Can Co.* v. *United States*, p. 706; *Great Lakes Broadcasting Co.* v. *Federal Radio Commission, Voliva* v. *Same*, and *Agricultural Broadcasting Co.* v. *Same*, p. 706.

No. 539. GAGLIONE *v.* UNITED STATES. February 24, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Messrs. William H. Lewis* and *Matthew L. McGrath* for petitioner. *Assistant Attorney General Luhring* and *Messrs. Claude R. Branch* and *Harry S. Ridgely* for the United States. Reported below: 35 F. (2d) 496.

No. 541. BALTIMORE & OHIO R. Co. *v.* CONTRELLA ET AL. February 24, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Messrs. William H. Eckert* and *Allen T. C. Gordon* for petitioner. *Mr. H. Fred Mercer* for respondents. Reported below: 35 F. (2d) 113.

No. 542. BALTIMORE & OHIO R. Co. *v.* PERUCCA ET AL. February 24, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Messrs. William H. Eckert* and *Allen T. C. Gordon* for petitioner. *Mr. H. Fred Mercer* for respondents. Reported below: 35 F. (2d) 113.

No. 549. MOTLOW ET AL. *v.* UNITED STATES. February 24, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. Charles A. Houts* and *P. H. Cullen* for petitioners. *Assistant Attorney General Youngquist, Messrs. Claude R. Branch, John J. Byrne,* and *W. Marvin Smith* for the United States. Reported below: 35 F. (2d) 90.

No. 550. BEVINGTON *v.* UNITED STATES. February 24, 1930. Petition for writ of certiorari to the Circuit Court

of Appeals for the Eighth Circuit denied. *Mr. Thomas F. Bevington* for petitioner. *Assistant Attorney General Youngquist* and *Mr. Claude R. Branch* for the United States. Reported below: 35 F. (2d) 584.

No. 552. CHICAGO, NORTH SHORE & MILWAUKEE R. Co. *v.* ELLIS. February 24, 1930. Petition for writ of certiorari to the Supreme Court of Wisconsin denied. *Messrs. Edgar L. Wood* and *A. L. Gardner* for petitioner. No appearance for respondent. Reported below: 227 N. W. 235.

No. 553. FAIRFAX DRAINAGE DISTRICT OF WYANDOTTE COUNTY, KANSAS, *v.* KANSAS CITY. February 24, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Mr. T. M. Lillard* for petitioner. *Messrs. John T. Barker, J. C. Petherbridge,* and *Fred Robertson* for respondent. Reported below: 34 F. (2d) 357.

No. 559. CITY OF NEWARK *v.* MILLS ET AL. February 24, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Thomas G. Haight* for petitioner. *Mr. Horace L. Cheyney* for respondents. Reported below: 35 F. (2d) 110.

No. 689. SNOOK *v.* OHIO. February 25, 1930. Petition for writ of certiorari to the Supreme Court of Ohio denied. *Messrs. Arthur M. Spiegel* and *Ernest O. Ricketts* for petitioner. No appearance for respondent. Reported below: 34 Oh. App. 60.

No. 551. CARNAHAN *v.* UNITED STATES. March 3, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Frank P. Walsh* for petitioner. *Assistant Attorney General Youngquist* and *Messrs. Claude R. Branch* and *John J. Byrne* for the United States. Reported below: 35 F. (2d) 96.

No. 558. STOCKTON *v.* MASSEY. March 3, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. J. Raymond Gordon* for petitioner. *Attorney General Mitchell, Assistant Attorney General Youngquist,* and *Messrs. Claude R. Branch* and *Paul D. Miller* for respondent. Reported below: 34 F. (2d) 96.

No. 560. SUGARMAN ET AL. *v.* UNITED STATES. March 3, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. Otto Christensen* and *Samuel A. King* for petitioners. *Attorney General Mitchell, Assistant Attorney General Youngquist, Messrs. Claude R. Branch, John J. Byrne,* and *Paul D. Miller* for the United States. Reported below: 35 F. (2d) 663.

No. 561. GOUDCHAUX *v.* JOY, RECEIVER. March 3, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Claude W. Dudley* for petitioner. No appearance for respondent. Reported below: 35 F. (2d) 649.

No. 562. PICCOLELLA *v.* COMMISSIONER OF IMMIGRATION, ELLIS ISLAND. March 3, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Sec-

ond Circuit denied. *Messrs. Charles Dickerman Williams* and *Carol Weiss King* for petitioner. *Assistant Attorney General Luhring, Messrs. Claude R. Branch, Harry S. Ridgely,* and *W. Marvin Smith* for respondent. Reported below: 36 F. (2d) 1022.

No. 565. HOOPER *v.* GOLDSTEIN. March 3, 1930. Petition for writ of certiorari to the Supreme Court of Illinois denied. *Mr. James H. Hooper, pro se. Mr. Sherman C. Spitzer* for respondent. Reported below: 168 N. E. 1.

No. 566. DELAWARE, LACKAWANNA & WESTERN R. Co. *v.* REARDON, ADMINISTRATRIX. March 3, 1930. Petition for writ of certiorari to the Court of Errors and Appeals of New Jersey denied. *Messrs. Frederic B. Scott* and *Walter J. Larrabee* for petitioner. *Mr. Clement K. Corbin* for respondent. Reported below: 147 Atl. 544.

No. 567. CONTINENTAL NATIONAL BANK *v.* HOLLAND BANKING Co. March 3, 1930. Petition for writ of certiorari to the Supreme Court of Missouri denied. *Messrs. George L. Edwards* and *Edward J. White* for petitioner. *Mr. Roscoe C. Patterson* for respondent. Reported below: 22 S. W. (2d) 821.

No. 568. RECEIVERS OF GULF STATES OIL & REFINING CORP. *v.* ISLAND OIL & TRANSPORT CORP. ET AL. March 3, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Leavitt J. Hunt* for petitioners. *Messrs. Francis L. Kohlman, Carl J. Rustrian, Saul J. Lance, Charles A. Boston,* and *William M. Chadbourne* for respondents. Reported below: 34 F. (2d) 649.

No. 571. ROYAL INDEMNITY CO. ET AL. *v.* ANDREW, SUPERINTENDENT OF BANKING OF IOWA, AS RECEIVER. March 3, 1930. Petition for writ of certiorari to the Supreme Court of Iowa denied. *Mr. Casper Schenk* for petitioners. No appearance for respondent. Reported below: 224 N. W. 499.

No. 572. AMERICAN SURETY CO. *v.* MULLENDORE, RECEIVER. March 3, 1930. Petition for writ of certiorari to the Supreme Court of Montana denied. *Mr. Sterling M. Wood* for petitioner. *Messrs. Charles H. Loud* and *William B. Leavitt* for respondent. Reported below: 281 Pac. 341.

No. 575. MOFFETT ET AL. *v.* UNITED STATES. March 3, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Messrs. Isaac Lobe Strauss* and *Edgar Allan Poe* for petitioners. *Attorney General Mitchell, Assistant Attorney General Youngquist,* and *Messrs. Claude R. Branch* and *Mahlon D. Kiefer* for the United States. Reported below: 36 F. (2d) 357.

No. 576. CALDWELL *v.* UNITED STATES. March 3, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Mr. Mark Goode* for petitioner. *Attorney General Mitchell, Assistant Attorney General Luhring, Messrs. Claude R. Branch, Harry S. Ridgely,* and *W. Marvin Smith* for the United States. Reported below: 36 F. (2d) 742.

No. 577. CALDWELL *v.* UNITED STATES. March 3, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Mr. Mark Goode*

for petitioner. *Attorney General Mitchell, Assistant Attorney General Luhring, Messrs. Claude R. Branch, Harry S. Ridgely,* and *W. Marvin Smith* for the United States. Reported below: 36 F. (2d) 738.

No. 578. UIHLEIN *v.* CITY OF ST. PAUL ET AL. March 3, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Edward S. Stringer* for petitioner. *Messrs. Eugene M. O'Neill* and *Lewis L. Anderson* for respondents. Reported below: 32 F. (2d) 748.

No. 580. PHOENIX BUILDING & HOMESTEAD ASSN. *v.* E. A. CARRERE'S SONS. March 3, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Royal E. Burnham* for petitioner. No appearance for respondents. Reported below: 33 F. (2d) 563.

No. 582. CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RY. CO. *v.* MCGILL, ADMINISTRATRIX. March 3, 1930. Petition for writ of certiorari to the Court of Appeals of Tennessee denied. *Messrs. John Weld Peck* and *Horace M. Carr* for petitioner. *Mr. W. T. Kennerly* for respondent.

No. 585. ALDINE REALTY CO. *v.* MANOR REAL ESTATE & TRUST CO. March 3, 1930. Petition for writ of certiorari to the Supreme Court of Pennsylvania denied. *Mr. Joseph Stadtfeld* for petitioner. *Messrs. William S. Dalzell* and *Frederic D. McKenney* for respondent. Reported below: 148 Atl. 56.

No. 587. HAFFA *v.* UNITED STATES. March 3, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. John D. Boddie* for petitioner. *Attorney General Mitchell, Assistant Attorney General Youngquist, Messrs. Claude R. Branch, John J. Byrne,* and *Paul D. Miller* for the United States. Reported below: 36 F. (2d) 1.

No. 588. ALABAMA CHEMICAL CO. *v.* INTERNATIONAL AGRICULTURAL CORP. March 3, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. S. H. Dent* and *Fred S. Ball* for petitioner. *Messrs. B. P. Crum, John D. Little,* and *Marion Smith* for respondent. Reported below: 35 F. (2d) 907.

No. 707. RISHEL *v.* COUNTY OF MCPHERSON, KANSAS, ET AL. March 3, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Minnie Rishel, pro se.* No appearance for respondents. Reported below: 34 F. (2d) 250.

No. 592. ATLANTIC COAST LINE R. CO. *v.* FLORIDA EX REL. DAVIS, ATTORNEY GENERAL, ET AL. March 12, 1930. Petition for writ of certiorari to the Supreme Court of Florida denied. *Messrs. F. B. Grier, W. E. Kay,* and *Thomas B. Adams* for petitioner. *Messrs. Fred H. Davis* and *Theodore T. Turnbull* for respondents. Reported below: 116 So. 48; 122 So. 256; 124 So. 429.

No. 593. HENDERSON COUNTY, KENTUCKY, *v.* STATE BANK OF NEW YORK ET AL.; and

No. 594. SAME *v.* SAME. March 12, 1930. Petition for writs of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. James W. Henson* and *John C. Worsham* for petitioner. *Mr. Edmund F. Trabue* for respondents. Reported below: 35 F. (2d) 859.

No. 595. HENDERSON COUNTY, KENTUCKY, *v.* STATE BANK OF NEW YORK ET AL.; and

No. 596. SAME *v.* SAME. March 12, 1930. Petition for writs of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. James W. Henson* and *John C. Worsham* for petitioner. *Mr. Edmund F. Trabue* for respondents. Reported below: 35 F. (2d) 859.

No. 599. MISSOURI PACIFIC R. CO. *v.* BUSHEY, ADMINISTRATRIX. March 12, 1930. Petition for writ of certiorari to the Supreme Court of Arkansas denied. *Messrs. Thomas B. Pryor* and *Edward J. White* for petitioner. *Mr. Frank Pace* for respondent. Reported below: 20 S. W. (2d) 614.

No. 601. CHENEY BROTHERS *v.* DORIS SILK CORP. March 12, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. John W. Davis* for petitioner. *Mr. Jesse S. Epstein* for respondent. Reported below: 35 F. (2d) 279.

No. 602. GASTON ET AL., RECEIVERS, *v.* RUTLAND R. CO. March 12, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. J. W. Redmond* and *Horace H. Powers* for petitioners. *Mr. Edwin W. Lawrence* for respondent. Reported below: 35 F. (2d) 685.

No. 603. MILLER ET AL. *v.* TAKE ET AL. March 12, 1930. Petition for writ of certiorari to the Supreme Court of Oklahoma denied. *Mr. A. J. Biddison* for petitioners. No appearance for respondents. Reported below: 281 Pac. 576.

No. 606. CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC R. Co. *v.* GAREDPY. March 12, 1930. Petition for writ of certiorari to the Supreme Court of Minnesota denied. *Messrs. F. W. Root, A. C. Erdall,* and *O. W. Dynes* for petitioner. *Mr. Frederick M. Miner* for respondent. Reported below: 176 Minn. 331; 226 N. W. 943.

No. 608. BINGHAM *v.* COMMISSIONER OF INTERNAL REVENUE. March 12, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. Robert N. Miller* and *J. Robert Sherrod* for petitioner. *Attorney General Mitchell, Assistant Attorney General Youngquist, Messrs. Claude R. Branch, Sewall Key, Morton Poe Fisher,* and *Clarence M. Charest* for respondent. Reported below: 35 F. (2d) 503.

No. 609. FEDERMAN *v.* UNITED STATES. March 12, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. Joseph G. M. Browne* and *Solon J. Carter* for petitioner. *Attorney General Mitchell, Assistant Attorney General Luhring, Messrs. Claude R. Branch, Harry S. Ridgely,* and *Paul D. Miller* for the United States. Reported below: 36 F. (2d) 441.

No. 612. CITY OF NEW YORK *v.* FEDERAL RADIO COMMISSION. March 12, 1930. Petition for writ of certiorari to the Court of Appeals of the District of Columbia denied.

Messrs. Arthur J. W. Hilly and *Joseph A. Devery* for petitioner. *Attorney General Mitchell, Assistant to the Attorney General O'Brian, Messrs. Claude R. Branch, Charles H. Weston, W. Marvin Smith,* and *Thad H. Brown* for respondent. Reported below: 36 F. (2d) 115.

No. 613. RICE ET AL. *v.* UNITED STATES. March 12, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. James A. Reed, Louis Titus,* and *John Wattawa* for petitioners. *Attorney General Mitchell, Assistant Attorney General Luhring, Messrs. Claude R. Branch, Harry S. Ridgely,* and *Paul D. Miller* for the United States. Reported below: 35 F. (2d) 689.

No. 616. LEIDESDORF, TRUSTEE IN BANKRUPTCY, *v.* UNION INDEMNITY CO. March 12, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Bernard Hershkopf* for petitioner. *Mr. Robert H. Elder* for respondent. Reported below: 37 F. (2d) 26.

No. 619. MCCORD RADIATOR & MFG. CO. *v.* HORVATH. March 12, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. James M. Beck, Charles E. Lewis,* and *Sherwin A. Hill* for petitioner. *Messrs. Merlin Wiley, O. L. Smith,* and *Robert Crosser* for respondent. Reported below: 35 F. (2d) 640.

No. 638. AUGLAIZE BOX BOARD CO. *v.* KANSAS CITY FIBRE BOX CO. March 12, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Wellmore B. Turner* for petitioner.

Mr. Murray Seasongood for respondent. Reported below: 35 F. (2d) 822.

No. 604. REX CO. ET AL. *v.* WENATCHEE REX SPRAY CO. ET AL. March 12, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. Francis C. Downey* and *Fred L. Chappell* for petitioners. *Messrs. John H. Miller, A. W. Boyken,* and *Alfred Gfeller* for respondents. Reported below: 35 F. (2d) 467.

No. 614. HATCH ET AL. *v.* UNITED STATES; and

No. 615. SAME. *v.* SAME. March 12, 1930. Petition for writs of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. H. M. Brackney* for petitioners. *Attorney General Mitchell, Assistant Attorney General Youngquist, Messrs. Claude R. Branch, Sewall Key,* and *Barham R. Gary* for the United States. Reported below: 34 F. (2d) 436.

No. 620. UNITED STATES EX REL. SHULTS BREAD CO. *v.* BOARD OF TAX APPEALS. March 12, 1930. Petition for writ of certiorari to the Court of Appeals of the District of Columbia denied. *Messrs. William C. Sullivan* and *Leon F. Cooper* for petitioner. *Attorney General Mitchell, Assistant Attorney General Youngquist, Messrs. Claude R. Branch, Sewall Key, Morton K. Rothschild, Clarence M. Charest,* and *Charles T. Hendler* for respondent. Reported below: 37 F. (2d) 442.

No. 621. BECKER *v.* UNITED STATES. March 12, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Messrs. Max V. Schoonmaker* and *Joseph A. Rossi* for petitioner. *Attor-*

ney General Mitchell, Assistant Attorney General Youngquist, Messrs. Claude R. Branch, Mahlon D. Kiefer, and *W. Marvin Smith* for the United States. Reported below: 36 F. (2d) 472.

No. 624. BARNES ET AL. *v.* CITY OF SPRINGFIELD. March 12, 1930. Petition for writ of certiorari to the Superior Court in and for the County of Hampden, Massachusetts, denied. *Mr. Louis C. Henin* for petitioners. *Mr. John P. Kirby* for respondent. Reported below: 168 N. E. 78.

No. 626. M. SAMUEL & SONS, INC., *v.* SECOND NATIONAL BANK OF TOLEDO. March 12, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Morris D. Kopple* for petitioner. *Mr. Robert C. Morris* for respondent. Reported below: 35 F. (2d) 1021.

No. 629. WILCOX *v.* NEW YORK CENTRAL R. Co. March 12, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. G. A. Boone* for petitioner. No appearance for respondent.

No. 635. CHURCH *v.* HARNIT ET AL. March 12, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. W. T. Kinder* and *John B. McMahon* for petitioner. *Mr. Lloyd T. Williams* for respondents. Reported below: 35 F. (2d) 499.

No. 644. MERARD HOLDING CO., INC. *v.* FITZGERALD. March 12, 1930. Petition for writ of certiorari to the Supreme Court of Errors and Appeals of Connecticut, denied. *Mr. William Harvey Smith* for petitioner.

Messrs. Homer Cummings, Walter N. Maguire, and *Charles D. Lockwood* for respondent. Reported below: 110 Conn. 130.

No. 654. PADGETT *v.* DISTRICT OF COLUMBIA;
No. 655. HILTON *v.* SAME;
No. 656. ELY *v.* SAME;
No. 657. STEINBERG *v.* SAME;
No. 658. NEWMAN *v.* SAME;
No. 659. JOHNSON *v.* SAME; and
No. 660. HERRON *v.* SAME. March 12, 1930. Petition for writs of certiorari to the Court of Appeals of the District of Columbia denied. *Messrs. Paul E. Lesh, Stanton C. Peelle, C. F. R. Ogilby, Dale D. Drain,* and *Jerome F. Barnard* for petitioners. *Messrs. William W. Bride* and *F. H. Stephens* for respondent. Reported below: 37 F. (2d) 444, 448.

No. 692. HINKLEY ET AL., TRUSTEES, *v.* ART STUDENTS LEAGUE OF NEW YORK. March 12, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Frederick J. Singley* for petitioners. *Mr. Charles McH. Howard* for respondent. Reported below: 37 F. (2d) 225.

No. 610. ST. LOUIS SOUTHWESTERN RY. CO. *v.* TEAGUE. March 17, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. J. Q. Mahaffey, J. R. Turney,* and *John J. King* for petitioner. *Mr. Wright Patman* for respondent. Reported below: 36 F. (2d) 217.

No. 618. BUTLER HOTEL CO., INC. ET AL. *v.* UNITED STATES. March 17, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit

denied. *Messrs. Arthur E. Griffin* and *Samuel B. Bassett* for petitioners. *Attorney General Mitchell, Assistant Attorney General Youngquist, Messrs. Claude R. Branch, John J. Byrne,* and *Paul D. Miller* for the United States. Reported below: 35 F. (2d) 76.

No. 622. PEARSON, RECEIVER, *v.* FARMERS NATIONAL BANK OF MONTICELLO ET AL. March 17, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. George S. Jones* and *A. O. Bacon Sparks* for petitioner. *Mr. Orville A. Park* for respondents. Reported below: 36 F. (2d) 732.

No. 634. TYROLER ET AL. *v.* ROUTZAHN, COLLECTOR OF INTERNAL REVENUE. March 17, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. Leon F. Cooper* and *M. S. Farmer* for petitioners. *Attorney General Mitchell, Assistant Attorney General Youngquist, Messrs. Claude R. Branch, Sewall Key, John Vaughan Groner,* and *W. Marvin Smith* for respondent. Reported below: 36 F. (2d) 208.

No. 639. BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF WELD *v.* UNION PACIFIC R. Co.; and

No. 640. BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF PROWERS *v.* ATCHISON, TOPEKA & SANTA FE RY. Co. March 17, 1930. Petition for writs of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Messrs. William B. Kelly* and *Charles Roach* for petitioners. *Messrs. Clayton C. Dorsey, Nelson H. Loomis, Gerald Hughes, W. W. Grant, Jr., Morrison Shafroth,* and *E. E. McInnis* for respondents. Reported below: 35 F. (2d) 785.

No. 641. AUSTIN CO. *v.* LUCAS, COMMISSIONER OF INTERNAL REVENUE. March 17, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. W. B. Stewart* and *C. M. Horn* for petitioner. *Attorney General Mitchell, Assistant Attorney General Youngquist, Messrs. Claude R. Branch, J. Louis Monarch,* and *W. Marvin Smith* for respondent. Reported below: 35 F. (2d) 910.

No. 645. ST. LOUIS-SAN FRANCISCO RY. CO. ET AL. *v.* ARKANSAS. March 17, 1930. Petition for writ of certiorari to the Supreme Court of Arkansas denied. *Messrs. Thomas B. Pryor, Edward T. Miller, Edward L. Westbrooke,* and *Edward J. White* for petitioners. *Messrs. Hal L. Norwood, Frank Pace,* and *Tom W. Campbell* for respondent. Reported below: 20 S. W. (2d) 878.

No. 646. MEYERS *v.* UNITED STATES;

No. 647. SAME *v.* SAME;

No. 648. SAME *v.* SAME; and

No. 649. SWIFT *v.* SAME. March 17, 1930. Petition for writs of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Arthur F. Schmidt* for petitioners. *Attorney General Mitchell, Assistant Attorney General Youngquist,* and *Messrs. Claude R. Branch* and *John J. Byrne* for the United States. Reported below: 36 F. (2d) 859.

No. 651. KANT-SKORE PISTON CO. *v.* SINCLAIR MFG. CORP. March 17, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. William L. Symons, Leonard Garver, Jr.,* and *David Lorbach* for petitioner. No appearance for respondent. Reported below: 32 F. (2d) 882.

No. 653. SCOTT *v.* CORN. March 17, 1930. Petition for writ of certiorari to the Court of Civil Appeals, Second Supreme Judicial District, of Texas, denied. *Mr. Sam R. Sayers* for petitioner. No appearance for respondent. Reported below: 19 S. W. (2d) 412.

No. 661. UNITED STATES EX REL. DERENCZ *v.* MARTIN, WARDEN; and

No. 662. DERENCZ *v.* UNITED STATES. March 17, 1930. Petition for writs of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. R. Palmer Ingram* for Derencz. *Attorney General Mitchell, Assistant Attorney General Youngquist,* and *Messrs. Claude R. Branch* and *Mahlon D. Kiefer* for the United States and Martin. Reported below: 36 F. (2d) 944.

No. 666. BOARD OF COUNTY COMMISSIONERS, COUNTY OF GARVIN, OKLAHOMA, ET AL. *v.* DENNIS, ET AL. March 17, 1930. Petition for writ of certiorari to the Supreme Court of Oklahoma denied. *Mr. Cicero I. Murray* for petitioners. No appearance for respondents. Reported below: 282 Pac. 457.

No. 668. SPENCER *v.* CHICAGO & NORTH WESTERN RY. CO. March 17, 1930. Petition for writ of certiorari to the Supreme Court of Illinois denied. *Mr. Richard J. Finn* for petitioner. *Messrs. Ray N. Van Doren* and *Samuel H. Cady* for respondent. Reported below: 236 Ill. 560.

No. 676. AMERICAN CAN CO. *v.* BOWERS, COLLECTOR OF INTERNAL REVENUE;

No. 677. MISSOURI CAN CO. *v.* SAME;

No. 678. AMERICAN CAN CO. *v.* SAME; and

No. 679. SAME v. SAME. March 17, 1930. Petition for writs of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Graham Sumner* for petitioners. *Attorney General Mitchell, Assistant Attorney General Youngquist, Messrs. Claude R. Branch, Sewall Key,* and *J. Louis Monarch* for respondent. Reported below: 35 F. (2d) 832.

No. 687. MAYTAG CO. *v.* MEADOWS MFG. CO. March 17, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. Wallace R. Lane, Edward S. Rogers* and *William J. Hughes* for petitioner. *Mr. Hal M. Stone* for respondent. Reported below: 35 F. (2d) 403.

No. 591. GREENFIELD TAP & DIE CORP. *v.* UNITED STATES. April 14, 1930. Petition for writ of certiorari to the Court of Claims denied. Motion to remand denied. *Mr. A. Henry Walter* for petitioner. *Attorney General Mitchell, Assistant Attorney General Rugg, Messrs. Claude R. Branch, Percy M. Cox,* and *Paul D. Miller* for the United States. Reported below: 68 Ct. Cls. 61.

No. 671. ARMSTRONG ET AL. *v.* CITY NATIONAL BANK OF GALVESTON, TEXAS. April 14, 1930. Petition for writ of certiorari to the Court of Civil Appeals, 1st Supreme Judicial District, of Texas, denied. *Messrs. George W. Armstrong* and *John H. Kirby, pro se.* No appearance for respondent. Reported below: 16 S. W. (2d) 954.

No. 672. SEABOARD AIR LINE R. Co. *v.* ATLANTA, BIRMINGHAM & COAST R. Co. April 14, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the

Fifth Circuit denied. *Messrs. W. R. C. Cocke, James F. Wright* and *Robert S. Parker* for petitioner. *Mr. John A. Hynds* for respondent. Reported below: 35 F. (2d) 609.

No. 682. DEGENER ET AL. *v.* BOYD, TRUSTEE. April 14, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Otto C. Wierum* for petitioners. *Mr. David W. Kahn* for respondent. Reported below: 37 F. (2d) 1.

No. 685. EARLY & DANIEL CO. *v.* PEARSON, RECEIVER. April 14, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. A. O. B. Sparks* and *R. F. Brock* for petitioner. *Mr. George S. Jones* for respondent. Reported below: 36 F. (2d) 732.

No. 688. MEINRATH BROKERAGE CO. *v.* COMMISSIONER OF INTERNAL REVENUE. April 14, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Chester A. Gwinn* for petitioner. *Attorney General Mitchell, Assistant Attorney General Youngquist, Messrs. Claude R. Branch, Sewall Key,* and *Barham R. Gary* for respondent. Reported below: 35 F. (2d) 614.

No. 630. BRACE *v.* GAUGER-KORSMO CONSTRUCTION CO. ET AL.; and

No. 631. FIDELITY BOND & MORTGAGE CO. ET AL. *v.* SAME. April 14, 1930. Petition for writs of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. James Love Hopkins* for petitioners. *Messrs. Will G. Akers* and *A. Longstreet Heiskell* for respondents. Reported below: 36 F. (2d) 661.

No. 770. McGrew *v.* McGrew et al.; and

No. 771. Same *v.* Same. April 21, 1930. Petitions for writs of certiorari to the Court of Appeals of the District of Columbia, and motion for leave to proceed *in forma pauperis,* denied. *Olive B. Lacy* for petitioner. No appearance for respondents. Reported below: 38 F. (2d) 541.

No. 799. Middleton *v.* California. April 21, 1930. Petition for writ of certiorari to the District Court of Appeal, 3rd Appellate District, of California, and motion for leave to proceed *in forma pauperis,* denied. *Mr. William W. Middleton, pro se.* No appearance for respondent. Reported below: 283 Pac. 976.

No. 611. Utica Knitting Co. *v.* United States. April 21, 1930. Petition for writ of certiorari to the Court of Claims denied. *Messrs. Harry A. Fellows* and *Henry M. Ward* for petitioner. *Attorney General Mitchell, Assistant Attorney General Rugg,* and *Messrs. Claude R. Branch* and *Charles R. Pollard* for the United States. Reported below: 68 Ct. Cls. 77.

No. 636. DuPuy *v.* United States; and

No. 637. Same *v.* Same. April 21, 1930. Petition for writs of certiorari to the Court of Claims denied. *Messrs. H. B. McCawley* and *Lamar Hardy* for petitioner. *Attorney General Mitchell, Assistant Attorney General Rugg, Messrs. Claude R. Branch, Charles R. Pollard,* and *W. Marvin Smith* for the United States. Reported below: 35 F. (2d) 990.

No. 665. Warren, Executrix, *v.* United States. April 21, 1930. Petition for writ of certiorari to the Court

of Claims, denied. *Mr. J. Gilbert Hardgrove* for petitioner. *Attorney General Mitchell, Assistant Attorney General Rugg, Messrs. Claude R. Branch, Heber H. Rice,* and *Paul D. Miller* for the United States. Reported below: 68 Ct. Cls. 634.

No. 684. RICH *v.* NU-ENAMEL PAINT CO. ET AL. April 21, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit, denied. *Messrs. Ray Van Cott* and *George Sergeant* for petitioner. *Mr. John Davis* for respondents. Reported below: 35 F. (2d) 1020.

No. 686. KASISKA *v.* MCDOUGALL, TRUSTEE IN BANKRUPTCY. April 21, 1930. Petition for writ of certiorari to the Supreme Court of Idaho denied. *Mr. T. C. Coffin* for petitioner. *Mr. W. G. Bissell* for respondent. Reported below: 282 Pac. 943.

No. 690. CHICAGO & EASTERN ILLINOIS RY. CO. *v.* MCCOY. April 21, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. H. B. Aikman* for petitioner. *Mr. Arthur H. Greenwood* for respondent. Reported below: 36 F. (2d) 227.

No. 691. CULLY *v.* MITCHELL ET AL. April 21, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Messrs. Chester I. Long, J. D. Houston, Peter Q. Nyce, Austin M. Cowan,* and *Thomas H. Owen* for petitioner. *Messrs. Thomas J. Flannelly, Nathan A. Gibson, Joseph L. Hull, Hunter L. Johnson,* and *C. A. Summers* for respondents. Reported below: 37 F. (2d) 493.

No. 693. P. W. Brooks & Co., Inc. *v.* North Carolina Public Service Co. April 21, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Messrs. Chester Rohrlich* and *Frank P. Hobgood* for petitioner. *Mr. W. S. O'B. Robinson, Jr.*, for respondent. Reported below: 37 F. (2d) 220.

No. 698. Claude Neon Lights, Inc. *v.* E. Machlett & Son et al. April 21, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Edwin J. Prindle, Thomas Ewing,* and *William Bohleber* for petitioner. *Messrs. Dean S. Edmonds* and *William H. Davis* for respondents. Reported below: 36 F. (2d) 574.

No. 699. New Haven Bank, Executor, *v.* Lucas, Commissioner of Internal Revenue. April 21, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Adrian C. Humphreys* and *Newton K. Fox* for petitioner. *Attorney General Mitchell, Assistant Attorney General Youngquist, Messrs. Claude R. Branch, John Vaughan Groner, Paul D. Miller, Clarence M. Charest,* and *P. S. Crewe* for respondent. Reported below: 36 F. (2d) 724.

No. 701. Danciger *v.* Smith, Bankrupt. April 21, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs I. J. Ringolsky* and *J. M. McCormick* for petitioner. No appearance for respondent. Reported below: 36 F. (2d) 345.

No. 702. Pabst *v.* Lucas, Commissioner of Internal Revenue. April 21, 1930. Petition for writ of certio-

rari to the Court of Appeals of the District of Columbia denied. *Messrs. Harry A. Fellows* and *Camden R. McAtee* for petitioner. *Attorney General Mitchell, Assistant Attorney General Youngquist, Messrs. Claude R. Branch, Sewall Key, Andrew D. Sharpe,* and *Paul D. Miller* for respondent. Reported below: 36 F. (2d) 614.

No. 703. CORNING GLASS WORKS *v.* LUCAS, COMMISSIONER OF INTERNAL REVENUE. April 21, 1930. Petition for writ of certiorari to the Court of Appeals of the District of Columbia denied. *Mr. Lawrence Graves* for petitioner. *Attorney General Mitchell, Assistant Attorney General Youngquist, Messrs. Claude R. Branch, Sewall Key, Morton P. Fisher, Paul D. Miller,* and *Clarence M. Charest* for respondent. Reported below: 37 F. (2d) 798.

No. 705. BELT RAILWAY CO. OF CHICAGO *v.* LUCAS, COMMISSIONER OF INTERNAL REVENUE. April 21, 1930. Petition for writ of certiorari to the Court of Appeals of the District of Columbia denied. *Messrs. R. Kemp Slaughter* and *Hugh C. Bickford* for petitioner. *Attorney General Mitchell, Assistant Attorney General Youngquist, Messrs. Claude R. Branch, Sewall Key, Barham R. Gary,* and *W. Marvin Smith* for respondent. Reported below: 36 F. (2d) 541.

No. 706. CONCORDIA LAND & TIMBER CO. *v.* WILLETTS WOOD PRODUCTS CO. ET AL. April 21, 1930. Petition for writ of certiorari to the Supreme Court of Louisiana denied. *Mr. G. P. Bullis* for petitioner. *Messrs. J. C. Theus* and *J. W. House* for respondents. Reported below: 124 So. 841.

No. 708. COHEN *v.* UNITED STATES. April 21, 1930. Petition for writ of certiorari to the Circuit Court of

Appeals for the Third Circuit denied. *Mr. William A. Gray* for petitioner. *Attorney General Mitchell, Assistant Attorney General Luhring, Messrs. Claude R. Branch, Harry S. Ridgely,* and *W. Marvin Smith* for the United States. Reported below: 36 F. (2d) 461.

No. 709. CROWN CENTRAL PETROLEUM CORP. *v.* BATES. April 21, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Edward S. Boyles* for petitioner. No appearance for respondent. Reported below: 37 F. (2d) 508.

No. 710. CLEVELAND RY. CO. *v.* LUCAS, COMMISSIONER OF INTERNAL REVENUE. April 21, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. Andrew Squire* and *Atlee Pomerene* for petitioner. *Attorney General Mitchell, Assistant Attorney General Youngquist, Messrs. Claude R. Branch, Sewall Key, Morton P. Fisher,* and *Clarence M. Charest* for respondent. Reported below: 36 F. (2d) 347.

No. 711. ONLEY *v.* LEHIGH VALLEY R. Co. April 21, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Sol Gelb* for petitioner. *Mr. Clifton P. Williamson* for respondent. Reported below: 36 F. (2d) 705.

No. 712. WOOD TOWING CORP. *v.* SOUTHERN TRANSPORTATION CO. April 21, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. John W. Oast, Jr.,* for petitioner.

Messrs. Henry H. Little, Francis S. Laws, Edward R. Baird, Jr., and *George M. Lanning* for respondent. Reported below: 38 F. (2d) 980.

No. 713. FISH ET AL. *v.* KENNAMER, JUDGE. April 28, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Messrs. Charles West* and *J. M. Springer* for petitioners. *Messrs. James C. Denton, John Rogers, Joseph L. Hull,* and *Nathan A. Gibson* for respondent. Reported below: 37 F. (2d) 243.

No. 714. SECURITY LIFE INSURANCE CO. *v.* BRIMMER, EXECUTRIX. April 28, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. James C. Jones, Jr.,* for petitioner. No appearance for respondent. Reported below: 36 F. (2d) 176.

No. 716. CLYDE STEAMSHIP CO. *v.* UNITED STATES. April 28, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Roscoe H. Hupper* and *William J. Dean* for petitioner. *Attorney General Mitchell, Assistant to the Attorney General O'Brian, Messrs. Claude R. Branch, Charles H. Weston,* and *Paul D. Miller* for the United States. Reported below: 36 F. (2d) 691.

No. 718. UNITED STATES SMELTING, REFINING & MINING CO. *v.* EVANS. April 28, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. John Jensen* and *G. A. Marr* for petitioner. No appearance for respondent. Reported below: 35 F. (2d) 459.

No. 720. KERCHEVAL *v.* UNITED STATES. April 28, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. Herbert C. Wade* and *S. J. Callaway* for petitioner. *Attorney General Mitchell, Assistant Attorney General Luhring,* and *Messrs. Claude R. Branch* and *Harry S. Ridgely* for the United States. Reported below: 36 F. (2d) 766.

No. 721. KNUDSEN *v.* WASHINGTON. April 28, 1930. Petition for writ of certiorari to the Supreme Court of Washington denied. *Messrs. John J. Sullivan* and *Roger O'Donnell* for petitioner. *Mr. Ewing Dean Colvin* for respondent. Reported below: 280 Pac. 922.

No. 722. SWIFT *v.* JACKSON ET AL. April 28, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Messrs. Chester I. Long, Peter Q. Nyce, J. B. Campbell, J. D. Houston,* and *W. D. Stanley* for petitioner. *Mr. Webster Ballinger* for respondents. Reported below: 37 F. (2d) 237.

No. 724. HYLTON *v.* SOUTHERN RY. CO. April 28, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. James A. Fowler* for petitioner. *Messrs. S. R. Prince, H. O'B. Cooper,* and *Charles H. Smith* for respondent. Reported below: 37 F. (2d) 843.

No. 725. SUGIMOTO *v.* NAGLE, COMMISSIONER OF IMMIGRATION. April 28, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Aylett R. Cotton* for petitioner. *Attorney*

General Mitchell, Assistant Attorney General Luhring, Messrs. Claude R. Branch, Harry S. Ridgely, and *Paul D. Miller* for respondent. Reported below: 38 F. (2d) 207.

No. 726. COLTHURST *v.* METROPOLITAN CASUALTY INSURANCE CO. April 28, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Raymond M. Hudson* for petitioner. *Mr. Joseph A. Burkart* for respondent. Reported below: 36 F. (2d) 559.

No. 727. MARTIN *v.* UNITED STATES. April 28, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. Jed C. Adams* and *W. B. Harrell* for petitioner. *Attorney General Mitchell, Assistant Attorney General Luhring,* and *Messrs. Claude R. Branch* and *Harry S. Ridgely* for the United States. Reported below: 36 F. (2d) 954.

No. 728. OWENS *v.* DANCY ET AL. April 28, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Mr. Henry B. Martin* for petitioner. *Messrs. J. Berry King* and *William L. Murphy* for respondents. Reported below: 36 F. (2d) 882.

No. 730. UNITED STATES *v.* BLACKMER. April 28, 1930. Petition for writ of certiorari to the Court of Appeals of the District of Columbia denied. *Messrs. Atlee Pomerene* and *Owen J. Roberts* for the United States. *Messrs. George Gordon Battle, Frederick DeC. Faust,* and *Charles F. Wilson* for respondent.

No. 731. UNITED STATES *v.* BLACKMER. April 28, 1930. Petition for writ of certiorari to the Court of Appeals of the District of Columbia denied. *Messrs. Atlee Pomerene* and *Owen J. Roberts* for the United States. *Messrs. George Gordon Battle, Frederick DeC. Faust,* and *Charles F. Wilson* for respondent.

No. 733. MCGEHEE *v.* HALL, TRUSTEE. April 28, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. George P. Garrett* for petitioner. No appearance for respondent. Reported below: 37 F. (2d) 854.

No. 735. JEBBIA ET AL. *v.* UNITED STATES. April 28, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr, Benjamin L. Rosenbloom* for petitioners. *Attorney General Mitchell, Assistant Attorney General Youngquist,* and *Messrs. Claude R. Branch* and *W. Marvin Smith* for the United States. Reported below: 37 F. (2d) 343.

No. 736. LOHM, RECEIVER, *v.* BRAGG, MILLSAPS & BLACKWELL, INC. April 28, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. George S. Jones* for petitioner. *Mr. Walter A. Harris* for respondent. Reported below: 36 F. (2d) 736.

No. 737. THE WAALHAVEN ET AL. *v.* POTASH IMPORTING CORP. April 28, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. John W. Crandall* and *George Whitefield Betts, Jr.,* for petitioners. *Mr. Carroll Single* for respondent. Reported below: 36 F. (2d) 706.

No. 738. PEARSON, RECEIVER, *v.* SUMMEY & TOLSON. April 28, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. George S. Jones* for petitioner. No appearance for respondent. Reported below: 36 F. (2d) 732.

No. 739. COURSON *v.* RIDALL. April 28, 1930. Petition for writ of certiorari to the Supreme Court of New York denied. *Messrs. Howard Cobb* and *Harold E. Simpson* for petitioner. *Mr. Riley H. Heath* for respondent. Reported below: 252 N. Y. 592.

No. 740. INSURANCE & TITLE GUARANTEE CO. *v.* LUCAS, COMMISSIONER OF INTERNAL REVENUE. April 28, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Hugh Satterlee, Alfred S. Weill, Walter C. Blakely,* and *Albert S. Lisenby* for petitioner. *Attorney General Mitchell, Assistant Attorney General Youngquist, Messrs. Claude R. Branch, J. Louis Monarch, Norman D. Keller,* and *W. Marvin Smith* for respondent. Reported below: 36 F. (2d) 842.

No. 734. MORRIS *v.* ROYAL INDEMNITY CO. May 5, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Frank Morris, pro se. Mr. Richard T. Lynch* for respondent. Reported below: 37 F. (2d) 90.

No. 742. LEHIGH & HUDSON RIVER RY. CO. *v.* LUCAS, COMMISSIONER OF INTERNAL REVENUE. May 5, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. R. Kemp*

Slaughter and *Hugh C. Bickford* for petitioner. *Attorney General Mitchell, Assistant Attorney General Youngquist, Messrs. Claude R. Branch, J. Louis Monarch, John Vaughan Groner, Clarence M. Charest,* and *P. S. Crewe* for respondent. Reported below: 36 F. (2d) 719; 38 F. (2d) 1015.

No. 743. CHESAPEAKE & OHIO RY. CO. *v.* COFFEY. May 5, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Samuel H. Williams* for petitioner. *Mr. Charles Curry* for respondent. Reported below: 37 F. (2d) 320.

No. 744. LAWS *v.* DAVIS ET AL. May 5, 1930. Petition for writ of certiorari to the Supreme Court of Ohio denied. *Mr. Walter A. DeCamp* for petitioner. *Mr. John Weld Peck* for respondents. Reported below: 34 Oh. App. 157.

No. 745. BALL *v.* WESTERN MARINE & SALVAGE CO. May 5, 1930. Petition for writ of certiorari to the Court of Appeals of the District of Columbia denied. *Mr. Lawrence Koenigsberger* for petitioner. *Messrs. Edwin C. Brandenburg* and *Louis M. Denit* for respondent. Reported below: 37 F. (2d) 1004.

No. 747. MASSEY ET AL. *v.* MILLER RUBBER CO. May 5, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. John J. Mahoney* for petitioners. *Mr. Louis M. Denit* for respondent. Reported below: 36 F. (2d) 466.

No. 748. KISSOCK *v.* DUQUESNE STEEL FOUNDRY CO. ET AL. May 5, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied.

Messrs. Harvey L. Lechner, Drury W. Cooper, and *John D. Morgan* for petitioner. *Mr. Lawrence Bristol* for respondents. Reported below: 37 F. (2d) 249.

No. 749. BUDLONG *v.* BUDLONG. May 5, 1930. Petition for writ of certiorari to the Superior Court for the County of Newport, Rhode Island, denied. *Margaret W. Budlong, pro se. Mr. Arthur M. Allen* for respondent. Reported below: 142 Atl. 537; 147 Atl. 425, 798.

No. 751. WRIGHTSVILLE & TENNILLE R. CO. *v.* CITIZENS & SOUTHERN NATIONAL BANK ET AL. May 5, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Alexander R. Lawton* for petitioner. *Mr. Charles E. Wainwright* for respondents. Reported below: 36 F. (2d) 736.

No. 752. ROBINSON, TRUSTEE, *v.* DICKEY, TRUSTEE IN BANKRUPTCY. May 5, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Arthur O. Fording* for petitioner. *Mr. Robert F. Cogswell* for respondent. Reported below: 36 F. (2d) 147.

No. 762. HERKIMER NATIONAL BANK *v.* BLUE, TRUSTEE IN BANKRUPTCY. May 5, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Charles E. Snyder* for petitioner. No appearance for respondent. Reported below: 37 F. (2d) 663.

No. 694. BEW *v.* UNITED STATES. May 5, 1930. Petition for writ of certiorari to the Court of Claims denied.

Messrs. R. Palmer Ingram, George R. Shields, and *George A. King* for petitioner. *Solicitor General Thacher, Assistant Attorney General Rugg,* and *Messrs. Claude R. Branch* and *Joseph H. Sheppard* for the United States. Reported below: 68 Ct. Cls. 642.

No. 758. HANSEN, RECEIVER, *v.* E. I. DU PONT DE NEMOURS & Co., INC. May 5, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Emil Hansen, pro se. Messrs. George H. Bond* and *William H. Button* for respondent.

No. 759. SILVA *v.* UNITED STATES. May 5, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Marshall B. Woodworth* for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist, Messrs. Claude R. Branch, John J. Byrne,* and *W. Marvin Smith* for the United States. Reported below: 35 F. (2d) 598; 38 F. (2d) 465.

No. 769. AMERICAN MUTUAL LIABILITY INSURANCE CO. *v.* MCCAFFREY ET AL. May 5, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. Palmer Hutcheson, Benjamin Brooks,* and *Harold S. Davis* for petitioner. No appearance for respondents. Reported below: 37 F. (2d) 870.

No. 773. LOUISIANA OIL REFINING CORP. *v.* REED ET AL. May 5, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs.*

Leon O'Quin and *H. C. Walker, Jr.*, for petitioner. *Mr. Frank J. Looney* for respondents. Reported below: 38 F. (2d) 159.

No. 776. WHEELOCK ET AL., RECEIVERS, *v.* NORTON, ADMINISTRATRIX. May 5, 1930. Petition for writ of certiorari to the Supreme Court of Missouri denied. *Messrs. Ralph T. Finley, James C. Jones, Lon O. Hocker, Frank H. Sullivan, James C. Jones, Jr.*, and *Silas H. Strawn* for petitioners. *Mr. David W. Hill* for respondent. Reported below: 23 S. W. (2d) 142.

No. 778. THOMPSON ET AL. *v.* HOUSTON OIL CO. ET AL. May 5, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. William D. Gordon* for petitioners. No appearance for respondents. Reported below: 37 F. (2d) 687.

No. 779. GUILE ET AL. *v.* STATLER. May 5, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Silas B. Axtell* for petitioners. *Messrs. Charles R. Hickox* and *Edwin S. Murphy* for respondent. Reported below: 36 F. (2d) 1021.

No. 697. ESCHER, ADMINISTRATOR, ET AL. *v.* UNITED STATES. May 5, 1930. Petition for writ of certiorari to the Court of Claims denied. *Messrs. Spier Whitaker, Lawrence A. Baker, Lyttleton Fox,* and *Henry Ravenel* for petitioners. *Solicitor General Thacher, Assistant Attorney General Rugg,* and *Mr. Claude R. Branch* for the United States. Reported below: 68 Ct. Cls. 473.

No. 723. SOUTHWEST POWER CO. *v.* PRICE, ADMINISTRATRIX. May 5, 1930. Petition for writ of certiorari to the Supreme Court of Arkansas denied. *Messrs. James B. McDonough* and *Frank M. Kemp* for petitioner. *Messrs. W. H. Fuller, George M. Porter,* and *Harry P. Warner* for respondent. Reported below: 22 S. W. (2d) 373.

No. 864. GUIVARCH ET AL. *v.* MARYLAND CASUALTY CO. May 19, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit, and motion for leave to proceed *in forma pauperis,* denied. *Mr. William B. Harrell* for petitioners. No appearance for respondent. Reported below: 37 F. (2d) 268.

No. 766. CARTER ET AL. *v.* UNITED STATES. May 19, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. Reuben R. Arnold, T. W. Hardwick, E. K. Wilcox,* and *Lee W. Branch* for petitioners. *Solicitor General Thacher, Assistant Attorney General Luhring, Messrs. Claude R. Branch, Harry S. Ridgely,* and *W. Marvin Smith* for the United States. Reported below: 38 F. (2d) 227.

No. 767. CARTER ET AL. *v.* UNITED STATES. May 19, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. Reuben R. Arnold, T. W. Hardwick, E. K. Wilcox,* and *Lee W. Branch* for petitioners. *Solicitor General Thacher, Assistant Attorney General Luhring, Messrs. Claude R. Branch, Harry S. Ridgely,* and *W. Marvin Smith* for the United States. Reported below: 38 F. (2d) 227.

No. 774. RIESENMAN ET AL. *v.* NESBIT ET AL. May 19, 1930. Petition for writ of certiorari to the Supreme Court of Pennsylvania denied. *Mr. Carl E. Glock* for petitioners. *Mr. John L. Nesbit* for respondents. Reported below: 148 Atl. 695.

No. 775. WILSON, ADMINISTRATRIX, *v.* LEHIGH VALLEY R. Co. May 19, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Israel G. Holender* for petitioner. *Mr. Thomas R. Wheeler* for respondent. Reported below: 38 F. (2d) 59.

No. 781. LABBEE *v.* THAVENOT STEAMSHIP Co. May 19, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Clarence E. Mellen* for petitioner. *Messrs. J. W. Griffin* and *Clarence Bishop Smith* for respondent. Reported below: 37 F. (2d) 52.

No. 782. INDIANAPOLIS UNION RY. Co. ET AL. *v.* CINCINNATI, INDIANAPOLIS & WESTERN R. Co.; and

No. 783. SAME *v.* SAME. May 19, 1930. Petition for writs of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. Joseph J. Daniels, Joseph S. Graydon,* and *H. N. Quigley* for petitioners. *Messrs. Murray Seasongood, Lester A. Jaffe,* and *F. J. Goebel* for respondent. Reported below: 36 F. (2d) 323.

No. 784. REIDER *v.* UNITED STATES. May 19, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Charles W. Middlekauff* for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs.*

Claude R. Branch and *W. Marvin Smith* for the United States.

No. 787. ELY & WALKER DRY GOODS CO. *v.* UNITED STATES. May 19, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. Henry J. Richardson, Frederic D. McKenney,* and *Thomas W. White* for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist, Messrs. Claude R. Branch, Sewall Key, Barham R. Gary,* and *Paul D. Miller* for the United States. Reported below: 34 F. (2d) 429.

No. 793. FESLER *v.* LUCAS, COMMISSIONER OF INTERNAL REVENUE. May 19. 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Walter L. Fisher* for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist, Messrs. Claude R. Branch, Sewall Key, John H. McEvers,* and *W. Marvin Smith* for respondent. Reported below: 38 F. (2d) 155.

No. 797. WRIGHT, COUNTY TREASURER OF SHAWNEE COUNTY, KANSAS, ET AL. *v.* CENTRAL NATIONAL BANK OF TOPEKA, KANSAS. May 19, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Messrs. A. B. Quinton* and *Eugene S. Quinton* for petitioners. *Messrs. John L. Hunt* and *S. M. Brewster* for respondent. Reported below: 37 F. (2d) 234.

No. 798. BLACKBURN CONSTRUCTION CO. *v.* CEDAR RAPIDS NATIONAL BANK. May 19, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Mr. Stephen A. George* for peti-

tioner. *Mr. A. H. Sargent* for respondent. Reported below: 37 F. (2d) 865.

No. 801. TEXAS & PACIFIC RY. CO. *v.* AARON. May 19, 1930. Petition for writ of certiorari to the Court of Civil Appeals, Sixth Supreme Judicial District, of Texas, denied. *Messrs. Joseph H. T. Bibb* and *T. D. Gresham* for petitioner. *Mr. S. P. Jones* for respondent. Reported below: 19 S. W. (2d) 930.

No. 802. TWIN CITY WATER SOFTENER CO. ET AL. *v.* AMERICAN DOUCIL CO. May 19, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. F. A. Whiteley* for petitioners. *Messrs. Harvey L. Lechner* and *Paul Synnestvedt* for respondent. Reported below: 36 F. (2d) 673.

No. 764. GUARANTY TRUST CO., TRUSTEE, *v.* MINNEAPOLIS & ST. LOUIS R. CO. ET AL.;

No. 765. HAWLEY ET AL. *v.* SAME;

No. 826. NEW YORK TRUST CO., TRUSTEE, *v.* SAME;

No. 827. BENNETT COMMITTEE *v.* SAME; and

No. 828. BANKERS TRUST CO., TRUSTEE, *v.* SAME. May 19, 1930. Petitions for writs of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. John W. Davis, Frank B. Kellogg, Edwin S. S. Sunderland, Warren S. Carter, Thomas O'G. FitzGibbon,* and *John Junell* for the Guaranty Trust Company, Trustee, and Hawley et al. *Messrs. Joseph M. Hartfield* and *Jesse E. Waid* for the New York Trust Company, Trustee, and The Bennett Committee. *Messrs. Charles Bunn* and *James H. McIntosh* for the Bankers Trust Company, Trustee. *Messrs. Henry W. Taft, Paxton Blair, Alfred A.*

Cook, Frederick F. Greenman, Henry V. Poor, and *Frederick G. Ingersoll* for the Minneapolis & St. Louis Railroad Company et al. *Solicitor General Thacher, Assistant to the Attorney General O'Brian,* and *Mr. Claude R. Branch* for the United States. Reported below: 36 F. (2d) 747.

No. 785. UNITED STATES *v.* FALL. May 19, 1930. Petition for writ of certiorari to the Court of Appeals of the District of Columbia denied. *Messrs. Atlee Pomerene* and *Owen J. Roberts* for the United States. *Messrs. Mark B. Thompson, William E. Leahy, Wilton J. Lambert,* and *Frank J. Hogan* for respondent.

No. 786. COMMERCIAL CASUALTY INSURANCE CO. *v.* WILLIAMS, TRUSTEE IN BANKRUPTCY. May 19, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Allan C. Rowe* for petitioner. *Mr. George Roundtree* for respondent. Reported below: 37 F. (2d) 326.

No. 788. FALK, EXECUTOR, *v.* IDAHO ET AL.; and

No. 789. FALK ET AL., EXECUTORS, *v.* SAME. May 19, 1930. Petition for writs of certiorari to the Supreme Court of Idaho denied. *Mr. Charles M. Kahn* for petitioners. *Messrs. W. D. Gillis* and *Leon M. Fisk* for respondents. Reported below: 283 Pac. 598.

No. 790. SOUTHERN PACIFIC CO. *v.* RAILROAD COMMISSION OF CALIFORNIA. May 19, 1930. Petition for writ of certiorari to the Supreme Court of California denied.

Messrs. James E. Lyons and *Harry H. McElroy* for petitioner. *Mr. Arthur T. George* for respondent.

No. 791. SOUTHERN PACIFIC CO. *v.* GEO. H. CROLEY CO., INC. May 19, 1930. Petition for writ of certiorari to the Railroad Commission of California denied. *Messrs. James E. Lyons* and *Harry H. McElroy* for petitioner. *Mr. Marcel E. Cerf* for respondent.

No. 794. COULTER ET AL. *v.* EAGLE & PHENIX MILLS. May 19, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. Frederic D. McKenney* and *Henry D. Gaggstatter* for petitioners. No appearance for respondents. Reported below: 35 F. (2d) 268.

No. 804. COMMERCIAL UNION ASSURANCE CO. *v.* JASS ET AL. May 19, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. T. A. Hammond* and *Haines H. Hargrett* for petitioner. No appearance for respondent. Reported below: 36 F. (2d) 9.

No. 806. MURPHY *v.* UNITED STATES. May 19, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Levi Cooke* for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist, Messrs. Claude R. Branch, John J. Byrne,* and *W. Marvin Smith* for the United States. Reported below: 38 F. (2d) 441.

No. 807. THOMPSON, RECEIVER, ET AL. *v.* OTIS ELEVATOR CO. May 19, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr.*

Daniel MacDougald for petitioners. *Messrs. Edwin W. Sims, Elwood G. Godman,* and *Martin H. Long* for respondent. Reported below: 38 F. (2d) 1020.

No. 808. TIN DECORATING CO. *v.* METAL PACKAGE CORP. May 19, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. T. J. Johnston, J. Granville Meyers,* and *Charles S. Jones* for petitioner. *Messrs. William Houston Kenyon, Theodore S. Kenyon,* and *Frederick B. Townsend* for respondent. Reported below: 37 F. (2d) 5.

No. 811. MORTGAGE GUARANTEE CO. *v.* WELCH, COLLECTOR OF INTERNAL REVENUE. May 19, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Ralph W. Smith* for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist, Messrs. Claude R. Branch, Sewall Key, Barham R. Gary,* and *Paul D. Miller* for respondent. Reported below: 38 F. (2d) 184.

No. 816. PETTIT *v.* LUCAS, COMMISSIONER OF INTERNAL REVENUE. May 19, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Messrs. James H. Maxey, T. J. Leahy,* and *C. S. MacDonald* for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist, Messrs. Claude R. Branch, Sewall Key,* and *Morton P. Fisher* for respondent. Reported below: 38 F. (2d) 976.

No. 825. UNITED STATES NAVIGATION CO., INC. *v.* CUNARD STEAMSHIP CO. ET AL. May 19, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for

the Second Circuit denied. *Messrs. Mark W. Maclay, Goldthwaite H. Dorr,* and *John Tilney Carpenter* for petitioner. *Mr. Roscoe H. Hupper* for respondents. Reported below: 39 F. (2d) 204.

No. 849. GRAHAM-BROWN SHOE CO. ET AL. *v.* HOLLIDAY, ALLEGED TRUSTEE. May 19, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Lee Gammage Carter* for petitioners. No appearance for respondent. Reported below: 36 F. (2d) 745.

No. 867. CITY OF NEW YORK *v.* CRANFORD CO. May 19, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Arthur J. W. Hilly* and *J. Joseph Lilly* for petitioner. *Messrs. Franklin Nevius, Asa B. Kellogg,* and *Harvey D. Jacob* for respondent. Reported below: 38 F. (2d) 52.

No. 652. LIVE STOCK NATIONAL BANK *v.* UNITED STATES. May 26, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. J. Robert Sherrod* for petitioner. *Attorney General Mitchell, Assistant Attorney General Youngquist, Messrs. Claude R. Branch, Sewall Key, John Vaughan Groner,* and *Paul D. Miller* for the United States. Reported below: 36 F. (2d) 334.

No. 757. NEWMAN, SAUNDERS & CO., INC., *v.* UNITED STATES. May 26, 1930. Petition for writ of certiorari to the Court of Claims denied. *Mr. Bernhard Knollenberger* for petitioner. *Solicitor General Thacher, Assistant Attorney General Rugg,* and *Mr Claude R. Branch* for the United States. Reported below: 36 F. (2d) 1009.

No. 814. MIAMI BANK & TRUST CO., TRUSTEE, *v.* KARSTEN. May 26, 1930. Petition for writ of certiorari to the Supreme Court of Florida denied. *Messrs. Frederick M. Hudson* and *Garland M. McNutt* for petitioner. No appearance for respondent. Reported below: 118 So. 492.

No. 818. C. O. TINGLEY & CO. ET AL. *v.* BADGER RUBBER WORKS. May 26, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. Russell M. Everett* and *Harry B. Rook* for petitioners. *Mr. Franklin G. Neal* for respondent. Reported below: 38 F. (2d) 630.

No. 819. LAIRD ET AL. *v.* TULLY ET AL. May 26, 1930. Petition for writ of certiorari to the Supreme Court of Alabama denied. *Messrs. Theodore J. Lamar and Douglas Arant* for petitioners. *Mr. Needham A. Graham, Jr.,* for respondents. Reported below: 125 So. 392.

No. 829. HILL *v.* LUCAS, COMMISSIONER OF INTERNAL REVENUE; and

No. 830. PLUMER *v.* SAME. May 26, 1930. Petitions for writs of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Messrs. Robert G. Dodge* and *Harold S. Davis* for petitioners. *Solicitor General Thacher, Assistant Attorney General Youngquist, Messrs. Claude R. Branch, Sewall Key, J. Louis Monarch, Clarence M. Charest,* and *John MacC. Hudson* for respondent. Reported below: 38 F. (2d) 165.

No. 834. SILVER *v.* WASHINGTON. May 26, 1930. Petition for writ of certiorari to the Supreme Court of Washington denied. *Mr. John J. Sullivan* for petitioner.

Mr. Ewing Dean Colvin for respondent. Reported below: 153 Wash. 686.

No. 836. BENNETT ET AL. *v.* U. S. SHIPPING BOARD EMERGENCY FLEET CORPORATION ET AL. May 26, 1930. Petition for writ of certiorari to the Court of Appeals of the District of Columbia denied. *Mr. Ashby Williams* for petitioners. *Solicitor General Thacher, Messrs. Claude R. Branch, J. Frank Staley,* and *W. Marvin Smith* for respondents. Reported below: 37 F. (2d) 811.

No. 838. FLOWERS *v.* POSITYPE CORP. May 26, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Francis X. Busch* for petitioner. *Mr. R. Randolph Hicks* for respondent. Reported below: 36 F. (2d) 617.

No. 839. FLORIDA NATIONAL BANK ET AL. *v.* EVANS. May 26, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Walter A. Harris* for petitioners. *Mr. John R. L. Smith* for respondent. Reported below: 38 F. (2d) 627.

No. 840. WESTERN & ATLANTIC RAILROAD *v.* LOCHRIDGE, ADMINISTRATRIX. May 26, 1930. Petition for writ of certiorari to the Supreme Court of Georgia denied. *Messrs. Fitzgerald Hall* and *Frank Slemons* for petitioner. *Mr. Samuel D. Hewlett* for respondent. Reported below: 152 S. E. 474.

No. 848. CABANGIS *v.* PHILIPPINE ISLANDS. May 26, 1930. Petition for writ of certiorari to the Supreme Court of the Philippine Islands denied. *Messrs. Pedro Guevara*

and *Claro M. Recto* for petitioners. *Messrs. William Cattron Rigby, W. A. Graham,* and *Edward A. Kreger* for respondent.

No. 850. RAUSCH, ADMINISTRATOR, *v.* COMMERCIAL TRAVELERS MUTUAL ACCIDENT ASSN. May 26, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. James C. Jones, Frank H. Sullivan,* and *James C. Jones, Jr.,* for petitioner. No appearance for respondent. Reported below: 38 F. (2d) 766.

No. 855. THEARD, RECEIVER AND TRUSTEE, ET AL. *v.* BUSHONG. May 26, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. Joseph W. Carroll* and *Delvaille H. Theard* for petitioners. *Mr. John D. Miller* for respondent. Reported below: 37 F. (2d) 690.

No. 861. JACKSON *v.* NORRIS ET AL. May 26, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Crandall Mackey* for petitioner. *Messrs. Mark McMahon* and *Gillis A. Johnson* for respondents. Reported below: 37 F. (2d) 511.

No. 875. CITY OF SHREVEPORT ET AL. *v.* SHREVEPORT RAILWAYS CO. May 26, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Frank J. Looney* for petitioners. *Messrs. W. H. Armbrecht* and *A. B. Freyer* for respondent. Reported below: 38 F. (2d) 945.

No. 953. SAMPSELL ET AL. *v.* CALIFORNIA. June 2, 1930. Petition for writ of certiorari to the District Court of Appeal, 1st Appellate District, of California, and motion

for leave to proceed *in forma pauperis*, denied. *Messrs. Lloyd E. Sampsell* and *Ethan A. McNabb, pro se.* No appearance for respondent. Reported below: 286 Pac. 434.

No. 627. AUTOQUIP MFG. CO. *v.* UNITED STATES. June 2, 1930. Petition for writ of certiorari to the Court of Claims denied. *Mr. George M. Wilmeth* for petitioner. *Attorney General Mitchell, Assistant Attorney General Rugg,* and *Messrs. Claude R. Branch* and *Ralph C. Williamson* for the United States. Reported below: 68 Ct. Cls. 362.

No. 833. WHITE STAR BUS LINE, INC., *v.* ROBERTS. June 2, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Mr. Carroll G. Walter* for petitioner. No appearance for respondent. Reported below: 38 F. (2d) 1.

No. 841. BURCKHARDT ET AL. *v.* NORTHWESTERN NATIONAL BANK ET AL. June 2, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. W. C. Bristol* for petitioners. *Messrs. Charles A. Hart* and *Alfred A. Hampson* for respondents. Reported below: 38 F. (2d) 568.

No. 842. BALANCED ROCK SCENIC ATTRACTIONS, INC., *v.* TOWN OF MANITOU. June 2, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Mr. Fred S. Caldwell* for petitioner. *Mr. C. W. Dolph* for respondent. Reported below: 38 F. (2d) 28.

No. 843. KAY *v.* FEDERAL TRADE COMMISSION. June 2, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Abbott*

Elliott Kay, pro se. Solicitor General Thacher, Assistant to the Attorney General O'Brian, Messrs. Claude R. Branch, Charles H. Weston, Robert E. Healy, and *Martin A. Morrison* for respondent. Reported below: 35 F. (2d) 160.

No. 854. St. Louis-San Francisco Ry. Co. *v.* Berry, Administratrix. June 2, 1930. Petition for writ of certiorari to the Supreme Court of Missouri denied. *Messrs. Edward T. Miller, Frank C. Mann,* and *Alexander P. Stewart* for petitioner. *Mr. John B. Pew* for respondent. Reported below: 26 S. W. (2d) 988.

No. 858. Chicago & Eastern Illinois Ry. Co. *v.* Divine, Administratrix. June 2, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Homer B. Aikman* for petitioner. *Mr. George O. Dix* for respondent. Reported below: 39 F. (2d) 537.

No. 859. Chicago & Eastern Illinois Ry. Co. *v.* Divine. June 2, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Homer B. Aikman* for petitioner. *Mr. George O. Dix* for respondent. Reported below: 39 F. (2d) 537.

No. 860. Matheny *v.* Edwards Ice Machine & Supply Co. June 2, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Arthur I. Moulton* for petitioner. No appearance for respondent. Reported below: 39 F. (2d) 70.

No. 862. Fidelity and Casualty Co. *v.* Howe. June 2, 1930. Petition for writ of certiorari to the Circuit

Court of Appeals for the Third Circuit denied. *Messrs. John C. Sherriff* and *W. Pitt Gifford* for petitioner. *Mr. B. B. McGinnis* for respondent. Reported below: 38 F. (2d) 741.

No. 863. NATIONAL LIFE ASSN. *v.* HOWE. June 2, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Messrs. John C. Sherriff* and *W. Pitt Gifford* for petitioner. *Mr. B. B. McGinnis* for respondent. Reported below: 38 F. (2d) 741.

No. 865. HOOPER *v.* BALULIS ET AL. June 2, 1930. Petition for writ of certiorari to the Supreme Court of Illinois denied. *Mr. James H. Hooper, pro se.* No appearance for respondents. Reported below: 338 Ill. 21.

No. 866. UNITED STATES EX REL. WALTER E. HELLER & Co. *v.* MELLON, SECRETARY OF THE TREASURY. June 2, 1930. Petition for writ of certiorari to the Court of Appeals of the District of Columbia denied. *Mr. Nathan B. Williams* for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. Claude R. Branch* and *Mahlon D. Kiefer* for respondent. Reported below: 40 F. (2d) 808.

No. 868. CHICAGO & EASTERN ILLINOIS RY. CO. *v.* NOELL ET AL. June 2, 1930. Petition for writ of certiorari to the St. Louis Court of Appeals of Missouri denied. *Messrs. Ralph T. Finley, James C. Jones, Frank H. Sullivan, James C. Jones, Jr.,* and *Lon O. Hocker* for petitioner. *Mr. David W. Hill* for respondents. Reported below: 21 S. W. (2d) 937.

No. 870. GRAND RAPIDS STORE EQUIPMENT CORP. *v.* WEBER SHOW CASE & FIXTURE CO. June 2, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Frank E. Liverance, Jr.*, for petitioner. *Messrs. Frederick S. Lyon* and *Leonard S. Lyon* for respondent. Reported below: 38 F. (2d) 730.

No. 871. FRANTZ *v.* WEST VIRGINIA. June 2, 1930. Petition for writ of certiorari to the Supreme Court of Appeals of West Virginia denied. *Mr. Russell L. Ritz* for petitioner. No appearance for respondent. Reported below: 152 S. E. 326.

No. 873. GALT *v.* CHICAGO. June 2, 1930. Petition for writ of certiorari to the Supreme Court of Illinois denied. *Mr. Howard F. Bishop* for petitioner. *Messrs. Samuel A. Ettelson* and *Gotthard A. Dahlberg* for respondent. Reported below: 337 Ill. 547.

No. 883. LEININBACH *v.* UNITED STATES. June 2, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. William A. Gray* for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist, Messrs. Claude R. Branch, John J. Byrne,* and *Paul D. Miller* for the United States. Reported below: 38 F. (2d) 442.

No. 886. ROSS *v.* UNITED STATES. June 2, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. J. Bernard Handlan* for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist, Messrs. Claude R. Branch, Mahlon D. Kiefer,* and *W. Marvin Smith* for the United States. Reported below: 37 F. (2d) 557.

No. 888. WENSTRAND *v.* ALBERT PICK & Co. June 2, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Daniel M. Dever* for petitioner. *Mr. Samuel E. Hirsch* for respondent. Reported below: 38 F. (2d) 25.

No. 894. IRON MOUNTAIN OIL Co. *v.* ALEXANDER, COLLECTOR OF INTERNAL REVENUE. June 2, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Messrs. Henry S. Conrad* and *Lisbon E. Durham* for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist, Messrs. Claude R. Branch, J. Louis Monarch,* and *Miss Helen R. Carloss* for respondent. Reported below: 37 F. (2d) 231.

No. 902. ALKSNE *v.* UNITED STATES. June 2, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Messrs. William H. Lewis* and *Matthew L. McGrath* for petitioner. *Solicitor General Thacher, Assitant Attorney General Youngquist,* and *Messrs. Claude R. Branch* and *A. W. Henderson* for the United States. Reported below: 39 F. (2d) 62.

No. 908. CURTIS ET AL. *v.* UNITED STATES. June 2, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Julian C. Ryer* for petitioners. *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. Claude R. Branch* and *W. Marvin Smith* for the United States. Reported below: 38 F. (2d) 450.

No. 912. FLYNN EX REL. KING *v.* TILLINGHAST, COMMISSIONER OF IMMIGRATION. June 2, 1930. Petition for

writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Messrs. Everett Flint Damon* and *Walter Bates Farr* for petitioner. *Solicitor General Thacher, Assistant Attorney General Luhring, Messrs. Claude R. Branch, Harry S. Ridgely,* and *W. Marvin Smith* for respondent. Reported below: 38 F. (2d) 5.

No. 938. CAPO *v.* UNITED STATES. June 2, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. J. V. Walton* and *Harold A. Henderson* for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist, Messrs. Claude R. Branch, Mahlon D. Kiefer,* and *John J. Byrne* for the United States. Reported below: 39 F. (2d) 52.

No. 940. SATINOVER *v.* UNITED STATES. June 2, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Frank F. L'Engle* for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist, Messrs. Claude R. Branch, Mahlon D. Kiefer,* and *John J. Byrne* for the United States. Reported below: 39 F. (2d) 52.

No. 947. MARSIGLIA *v.* UNITED STATES. June 2, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Angelo Marsiglia, pro se. Solicitor General Thacher, Assistant Attorney General Luhring,* and *Messrs. Claude R. Branch* and *W. Marvin Smith* for the United States. Reported below: 38 F. (2d) 1017.

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CASES DISPOSED OF WITHOUT CONSIDERATION BY THE COURT FROM JANUARY 28, 1930, TO AND INCLUDING JUNE 2, 1930.

No. 536. WISS *v.* BOOTH FISHERIES CO. Appeal from the District Court of the United States for the District of Oregon. March 3, 1930. Dismissed with costs pursuant to Rule 12. *Mr. Arthur I. Moulton* for appellant. No appearance for appellee.

No. 605. SKINNER & EDDY CORP. *v.* UNITED STATES. On petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit. March 17, 1930. Dismissed on motion of *Mr. Louis Titus* for the petitioner. *Messrs. George Donworth, Livingston B. Stedman,* and *Charles K. Poe* also appeared for petitioner. No appearance for the United States. Reported below: 35 F. (2d) 889.

No. 607. KESTIAN ET AL. *v.* ILLINOIS. Error to the Supreme Court of Illinois. March 17, 1930. Dismissed with costs pursuant to Rule 12. *Mr. F. L. Barnett* for plaintiffs in error. No appearance for defendant in error. Reported below: 335 Ill. 596.

No. 426. GOTTLIEB *v.* MAHONING VALLEY SANITARY DISTRICT ET AL. Appeal from the Supreme Court of Ohio. April 14, 1930. Dismissed with costs on motion of *Messrs. Luther Day, William L. Day,* and *W. J. Kenealy* for appellant. *Messrs. James E. Bennett, Oscar E. Diser, Charles M. Wilkins, Paul Z. Hodge, Carl Armstrong, Newton D. Baker,* and *Carmi Thompson* for appellees. Reported below: 120 Oh. St. 449.

281 U.S. Cases Disposed of Without Consideration by the Court.

No. 831. PERKINS *v.* OHIO. Appeal from the Supreme Court of Ohio. April 21, 1930. Docketed and dismissed on motion of *Mr. John J. Chester, Jr.*, for appellee. Reported below: 172 N. E. 305.

No. 835. MARTIN *v.* RUDOLPH, WARDEN OF THE MISSOURI STATE PENITENTIARY. Error to the Supreme Court of Missouri. April 22, 1930. Docketed and dismissed on motion of *Mr. Walter E. Sloat* for appellee.

No. 370. FEDERAL TRADE COMMISSION *v.* WESTERN MEAT CO. ET AL. On writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit. May 19, 1930. Writ of certiorari dismissed and mandate granted on motion of *Solicitor General Thacher* for petitioner. *Messrs. Edward F. Barry, Frank L. Horton,* and *Charles Aaron* for respondents. Reported below: 33 F. (2d) 824.

No. 951. REEDAL ET AL. *v.* BROTHERTOWN REALTY CORP. Appeal from the Supreme Court of Wisconsin. May 26, 1930. Docketed and dismissed on motion of *Mr. Frederick DeC. Faust* for appellee. Reported below: 227 N. W. 390.

No. 755. SCAIFE *v.* SCAIFE. Appeal from the Supreme Court of Pennsylvania. May 26, 1930. Dismissed with costs on motion of *Mr. H. F. Stambaugh* for appellant. No appearance for appellee. Reported below: 298 Pa. 33.

No. 756. MCKEE ET AL. *v.* SCAIFE. Appeal from the Supreme Court of Pennsylvania. May 26, 1930. Dismissed with costs on motion of *Mr. William S. Dalzell* for appellants. No appearance for appellee. Reported below: 298 Pa. 33.

The rules of practice in admiralty heretofore promulgated by this Court (254 U. S. appendix) are amended by including therein a new rule numbered 46½ and reading as follows:

"In deciding cases of admiralty and maritime jurisdiction the court of first instance shall find the facts specially and state separately its conclusions of law thereon; and its findings and conclusions shall be entered of record, and, if an appeal is taken from the decree, shall be included by the clerk in the record which is certified to the appellate court under rule 49."

This new rule shall become effective October 1, 1930.

JUNE 2, 1930.

The rules of practice in equity heretofore promulgated by this Court (226 U. S. appendix) are amended by including therein a new rule numbered 70½ and reading as follows:

"In deciding suits in equity, including those required to be heard before three judges, the court of first instance shall find the facts specially and state separately its conclusions of law thereon; and its findings and conclusions shall be entered of record and, if an appeal is taken from the decree, shall be included by the clerk in the record which is certified to the appellate court under rules 75 and 76."

This new rule shall become effective October 1, 1930.

JUNE 2, 1930.

Summary Statement of Business of the Supreme Court of the United States for October Term, 1929.

Original Docket.

Cases pending at beginning of term	18
New cases docketed during term	3
Cases finally disposed of	3
Cases not finally disposed of	18

Appellate Docket.

Cases pending at beginning of term	125
New cases docketed during term	838
Cases finally disposed of	791
Cases not finally disposed of	172

The number of pending cases, original and appellate, was thus increased by 47.

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